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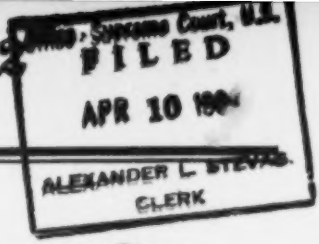

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 10, 1984

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QUESTIONS PRESENTED

1. Whether the Court below erred in holding, in direct conflict with this Court's decision in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), that the Commission need not make public interest findings to justify a Section 206 order under the Power Act changing rates, which by contract can be changed only by its action, for the sole purpose of benefiting the utility.

2. Whether the Court below erred in retroactively implementing this new legal standard by applying it to existing contracts made under prior law.

3. Whether the Court below erred in holding, in direct conflict with the decision of this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) and the decision of the Tenth Circuit in *Southern Union Gas Co. v. FERC*, 725 F.2d 99 (1984) that the Commission had implied equitable powers to make rates retroactively effective in violation of the "filed rate" doctrine and the requirement of Section 206(a) that rates prescribed by the Commission may apply only prospectively.

PARTIES BELOW

Arizona Public Service Company
Electrical District No. 1
Federal Energy Regulatory Commission
Papago Tribal Utility Authority

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

NO. 83-

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OCTOBER TERM, 1983

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Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Papago Tribal Utility Authority (PTUA), the petitioner below, petitions for a Writ of Certiorari to review the December 13, 1983 decision of the United States Court of Appeals for the District of Columbia Circuit in *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission,* 723 F.2d 950 *(Papago II),* and the January 12, 1984 Court Order Denying Petition for Rehearing of Petitioner in the same case. Petitioner also seeks summary reversal of these court decisions and orders.

The challenged actions of the Court below affirm the January 25, 1982 Order on Remand and the March 26, 1982 Notice of Denial of Application for Rehearing issued by the Federal Energy Regulatory Commission (FERC or Commission) in response to the decision of another panel of the same Court in *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (1979) *(Papago I)*. That earlier Court decision reversed the Federal Power Commission's (FPC) prior holding that Arizona Public Service Company (APS) could lawfully, under the terms of its contract, unilaterally increase rates to PTUA by merely filing new tariffs and rate schedules with the Commission.

OPINIONS AND ORDERS BELOW

The decision and order of the United States Court of Appeals for the District of Columbia Circuit affirming the Commission's Order on Remand of January 25, 1982 in FERC Docket No. ER76-530 is reported at 723 F.2d 950 and is reprinted in Appendix C. The Commission's Order on Remand is reported at 18 FERC ¶ 61,066 and is set out in Appendix A.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 13, 1983. (App. 25). On January 14, 1984, the Court of Appeals denied petitioner's motions for rehearing and for rehearing with the suggestion of rehearing en banc (App. 43-44). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

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[1]Hereafter, references to the Appendix shall be designated (App. ___).

STATUTES INVOLVED

The statute upon which the Court of Appeals' decision is based is the Federal Power Act, 16 U.S.C. § 824 *et seq.*, the relevant portions of which appear in Appendix E.

STATEMENT OF THE CASE

Arizona Public Service Company (APS) sells electricity at wholesale (for resale to ultimate consumers), in the State of Arizona. Its wholesale rates are regulated by the FERC under the Federal Power Act (Act), 16 U.S.C. § 824 *et seq.* Papago Tribal Utility Authority is an unincorporated agency of the Papago Indian Tribe, organized to provide electrical service to the Papago Reservation. PTUA purchases all of its energy requirements from APS.

By way of background, it is necessary to delineate the differences between Sections 205 and 206 of the Act. In a trilogy of cases, this Court has established the basic pattern of regulation under both the Federal Power Act and the Natural Gas Act, 15 U.S.C § 717 *et seq.*, which are *in pari materia*, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Sierra, supra.*; *United Gas Pipe Line v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958). In *Mobile*, this Court held that under these Acts the relations between the utility and its wholesale customers are established by contract and that rates could be changed by the utility, if at all, only in accordance with the rate change provisions of the contract. *Mobile*, as interpreted by *Memphis*, identified two types of contract. The first is a Section 205 contract in which the customer agrees to pay the "going rate" for service as established in the rate schedule on file with the Commission. The second is a Section 206 contract which establishes the rate, or a method of fixing the rate. These Section 206 rates or rate methods were held in these cases to be changeable only by agreement of the parties

or by a Commission order. The term "*Sierra* burden of proof" refers to a Section 206 customer whose contract can only be changed by a Commission order finding it contrary to the public interest (*Sierra* at 355).

The Hecla Mining Company and El Paso Natural Gas Company formed a joint venture to invest over $400 million to exploit copper deposits on the Papago reservation using a pollution-free process which required large quantities of electricity. PTUA and APS executed a wholesale power supply contract which had been approved by PTUA's board of directors on April 21, 1971. Section 3 of the APS-PTUA contract which governs rates established *fixed* rates to be charged to PTUA, and adjustment formulas by which specified demand and energy components of the rate would be automatically adjusted up or down *each month*. (App. 30; see also Appendix F, Section 3 and Exhibit B). APS charged PTUA for service, in accordance with the contract rate, from April 15, 1972 (when service began) and sought to change that rate only on February 6, 1976, when it filed with the FPC[2] in Docket No. ER76-530, a rate increase under Section 205 of the Act, 16 U.S.C. § 824d (Certified Record No. 82-1338, p. 599A).[3] On March 19, 1976, PTUA moved to reject APS' filing on the grounds that, since it is a Section 206 customer, APS is not permitted to unilaterally make effective a rate increase with respect to it by filing new tariffs

[2]Pursuant to Section 402(a) of the Department of Energy Organization Act, 42 U.S.C. Sec. 7172(a), the FPC's functions were transferred to the FERC. References herein to the agency action shall for the purpose of continuity be made to the agency which actually took the action. We shall also refer to the agency generically as the "Commission."

[3]References to the Certified Record in D.C. Circuit Nos. 82-1338 and 1339 shall hereafter be designated (R.____).

under Section 205 of the Act. (R.640A). On March 31, 1976, the FPC denied this motion (R.705A). On April 30, 1976, PTUA petitioned for rehearing of this order (R.747A), and on September 28, 1976, the Commission denied rehearing (R.922A).

PTUA then filed a petition for review of the March 31 and September 28 Orders with the Court of Appeals. On August 21, 1979, that Court reversed the Commission and held that PTUA is a Section 206 customer with respect to which APS may not make unilateral rate increases. *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (1979) (hereinafter "*Papago I*"). The Court held "...that the agreements, properly construed, authorized rate revisions only by an appropriate order of the Commission in a Section 206(a) proceeding." (Footnote omitted, *Papago I* at 930). The Court then remanded the case to the Commission for further proceedings on the issue of "... whether the rigorous *Sierra* burden of proof must be employed should APS seek Commission relief pursuant to Section 206(a)." (*Papago I*, ftn. 127 at 930).

While *Papago I* was pending in the Court of Appeals, Commission proceedings were held in Docket No. ER76-530 on the assumption that PTUA was a Section 205 customer, as to which APS could unilaterally increase the rates to be charged subject only to review by the Commission, under the "just and reasonable" rate standard.

On December 19, 1977, the Administrative Law Judge (ALJ) issued an Initial Decision (R.3726) concerning just and reasonable rates for PTUA and other Section 205 customers. On August 1, 1978, the Commission affirmed the Initial Decision in almost all respects (R.4049). That decision was effective as to PTUA on May 1, 1976, the date on which APS had made its unilateral Section 205 rate

increase effective subject to refund. This Commission order was, in effect, reversed by *Papago I* which held that the Section 205 proceeding instituted against PTUA was a nullity.

After the issuance of *Papago I*, APS and PTUA both requested the Commission to issue an order on remand. APS argued that it need not meet the *Sierra* burden of proof. PTUA argued that APS must meet the *Sierra* burden and must make refunds of all amounts collected in excess of the preexisting contract rates. Alternatively, PTUA argued that if the Commission failed to interpret the language of the APS-PTUA contract so as to impose a *Sierra* burden of proof, it should reopen the record in Docket No. ER76-530 to take evidence regarding the actual intent of the parties to the contract.

In its Order on Remand, issued on January 25, 1982 (Appendix A), the Commission held that APS need not meet the *Sierra* burden of proof, denied PTUA's motion to reopen the record, made—for the first time—a finding that APS' existing contract rates to PTUA were unreasonably low and therefore unlawful under Section 206(a) and made this finding effective as of the date of issuance of its rate order of August 1, 1978 (42 months earlier). (App. 10-11). These actions were taken after the August 1, 1978 Order had been voided by *Papago I*.

PTUA's application for rehearing of this Order on Remand was denied, without opinion, on March 26, 1982 by issuance of a Notice of Denial of Application for Rehearing (App. 23). The Court's opinion of December 13, 1983 denied PTUA's petition for review. The Court held that the Power Act authorized (1) company-made rates under Section 205, (2) Commission-made rates in the exercise of its overriding power to protect the public interest under Section 206, and

(3) "just and reasonable" rates under Section 206. (App. 28-29). The Court explicitly admitted (App. 29, ftn. 5) in *Papago II* and by reference therein to the companion case of *Kansas Cities v. FERC*, 723 F.2d 82, decided by the same panel on the same day (723 F.2d 950, at 954) that its holding that the Commission had statutory power, under Section 206, to change contract rates by making "just and reasonable" findings rather than "public interest" findings was a departure from the settled law as interpreted by this Court in *Sierra*, and as understood by all concerned *(i.e.*, the parties to the contracts and the Commission).

The Court also found that the Commission had interpreted the language of the APS-PTUA contract on remand as authorizing "a Commission-initiated proceeding to set just and reasonable rates under § 206 of the Act." (App. 27). The Court below held this significant because the parties had acted to ". . . contractually eliminate the utility's right to make immediately effective rate changes under § 205 but leave unaffected the power of the Commission under § 206 to replace not only rates that are contrary to the public interest but also rates that are unjust, unreasonable, or unduly discriminatory or preferential to the detriment of the contracting purchaser." (App. 29).

The Court also held that the Commission could lawfully make retroactive to August 1, 1978, the date of its prior rate determination, the new rates established in its January 25, 1982 Order on Remand (App. 36-41). The Court conceded that on remand ". . . the Commission made an explicit finding (for the first time) that APS' pre-existing rates were not 'just and reasonable', and made the rates approved in its 1978 Order effective from August 1, 1978 so as to put the parties in the position they would have occupied had the Commission initially interpreted the contract as later

required by *Papago I*." (App. 27). The Court held that where an agency had erroneously treated a wholesale customer as being subject to Section 205 instead of Section 206, the equities were with the utility because the prospective rates authorized by Section 206(a) would not allow the company to earn the same return it would have earned, had the agency not made a mistake of law. Under such circumstances, the Court below viewed this Court's *Sierra* holding, 350 U.S. at 353, as a directive "to look to the substance of the requirements of § 206(a) rather than to its rigid formalities," (App. 37). It held that such substantive requirements were satisfied here because the Commission had adopted, by silence, an ALJ's initial decision holding the return earned by APS on service to PTUA to be "outside the zone of reasonableness" (App. 38). In addition, the Court made its own findings that "as a matter of law" rates under a particular contract yielding a return of one-half of one percent fall outside the zone of reasonableness, so that the Commission's 1978 determination that the proposed rates were reasonable amounted to a finding that the existing rates were not. (App. 39). In its view, the unique equities of this case removed it from the general rule that "it will ordinarily be an abuse of the Commission's discretion not to make the latter finding [that the contract rate is unlawful] explicit." (App. 41).

REASONS FOR GRANTING WRIT

Petitioner respectfully submits that the Court below should be reversed because it has clearly erred in deciding important federal questions in direct conflict with prior decisions of this Court and of other courts of appeals, and has construed Section 206(a) of the Power Act in a manner contrary to the intent of Congress. These departures from

the accepted and usual course of judicial proceedings call for *per curiam* reversal.

1. The decision below is in direct conflict with this Court's decisions construing the Power Act, *Sierra*, 350 U.S. 348, and the Gas Act, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, (1956). The pertinent provisions of these two statutes have been held to be identical by this Court, *Sierra* at 353. The essence of the decision of the Court below, and of the Commission's Order on Remand which it affirmed, is that Section 206 of the Power Act authorizes the agency to replace contractual rates, and rate changing methods, if it can show either that the public interest so requires or that such action is needed to insure that the utility will earn an adequate return under the "just and reasonable" rate standard. (App. 28-30). The Court below based its decision that the Commission's interpretation of PTUA's contract was correct on the theory that there are three types of "contractual arrangements for rate revision" (App. 28) permitted by the Act and that "... the APS/PTUA contract adopted the last of these three [contractual] regimes." (App. 29-30). Therefore, the crucial and dispositive issue here is the scope of the Commission's power to issue orders, under Section 206 of the Act, for the purpose of modifying contracts on the basis of the third regime *(i.e.,* that the existing rate does not produce an adequate return to the utility).[4]

In both *Sierra* and *Mobile,* the wholesale customer opposed a unilateral rate increase filed with the Commission by its interstate supplier of electricity or gas. The customers argued that Section 205 of the Power Act and Section 4 of the Gas Act did not authorize changes in contract rates to be

[4]Thus, if this Court reverses this new interpretation of § 206(a), the contract interpretation of the Court below automatically falls.

made by the unilateral filing by a public utility of a new rate schedule or by an order of the Commission entered in a proceeding held thereon.[5] This Court agreed, holding that these Acts which deal with wholesale, rather than retail, transactions preserve the integrity of contracts on which vast investments have been made by wholesale customers and ultimate consumers. They neither enlarge nor detract from the powers natural gas companies and public utilities have, absent the Acts, to initially make, and change, rates. *Mobile*, 350 U.S. at 331-344.

Most importantly, this Court held that its interpretation of such Acts, while precluding the companies from unilaterally changing their contracts simply because it is in their private interests to do so, did not deprive them of an avenue of relief when their interests coincided with the public interest. This Court held that such "contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." (*Id.*). *Sierra* specifically extended the doctrine of *Mobile* to the Power Act, *Sierra* at 353.

2. In addition to this conflict in principle, there is an equally direct conflict involving the type of findings necessary to satisfy the statutory condition precedent to the Commission's exercise of its power under Section 206(a). Section 206(a) requires a finding that the existing contract rate is "unjust, unreasonable, unduly discriminatory or preferential" before the agency can fix a new rate "to be thereafter observed." In its Order on Remand, the Commission expressly conceded—for the first time—that this requirement of Section 206 was applicable to PTUA. (App. 10). The Commission made no such finding in its August 1, 1978 Order which was issued on the premise that Section 206 did not apply to PTUA.

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[5]Such orders are made under Section 206 or Section 5. 350 U.S. 344.

The Commission found that the "just and reasonable" standard was incorporated in Section 206 and required that APS' "rates should be determined by reference to its fully allocated costs, consistent with the Commission's normal ratemaking methods." (App. 9). In other words, the Commission held APS entitled to earn the same just and reasonable rate of return on its Section 205 and 206 customers, and, applying that view of the proper standard, found that APS' earned rate of return under the existing contract rates on the service to PTUA would only be .552 percent. (App. 10, ftn. 4). The Court below agreed that the adequacy of the return APS earned on service to PTUA must be measured against the return earned on service to Section 205 customers (App. 37-40).

But, in *Sierra* at 353-355, this Court squarely rejected the Commission's effort to justify a finding that existing contract rates were unjust and unreasonable within the purview of Section 206(a) on the ground that such rates produced less than the stipulated reasonable rate of return. Thus, it held:

> In short, the Commission holds that the contract rate is unreasonable solely because it yields less than a fair return on the net invested capital. . . . That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.' When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility.

Consequently, the decision below is squarely in conflict with *Sierra*, and contrary to Congressional intent.

3. The decision below is in conflict with decisions of this Court and of the various courts of appeals (including prior decisions of the District of Columbia Circuit). This conflict stems from the retroactive application in *Papago II*, and in the simultaneously decided *Kansas Cities* case, by the Court below of the new law it made regarding the scope of the Commission's powers under Section 206(a) to fix just and reasonable rates without making any public interest findings to support such action. Thus, it made its new statutory interpretation applicable to contracts entered into at a time when neither the parties to the contract, nor the Commission, believed that there was any type of Section 206 contract other than a *Sierra* burden of proof contract. It is hornbook law that the law (including judicial precedents) existing at the time a contract is entered into becomes part of the contract as if it were expressly referred to or incorporated therein, *Wood v. Lovett*, 313 U.S. 362, 370 (1971); *Maryland National Park and Planning Commission v. Lynn*, 514 F.2d 829, 833 (D.C. Cir. 1975); *In Re Pringle Engineering and Manufacturing Co.*, 164 F.2d 299, 301 (7th Cir. 1948); *St. Paul's Mercury Indemnity Co. v. Rutland*, 225 F.2d 689, 692 (5th Cir. 1955).

The Court below candidly admitted that non-*Sierra* burden of proof Section 206 contracts did not exist at the time the contracts involved in *Papago II*[6] and *Kansas Cities* were made (723 F.2d at 87), and that the public interest standard of *Sierra* was automatically applicable in all Section 206 proceedings (*Papago II*, App. 32, ftn. 5). Thus, *Kansas Cities* held (at 87):

> Preliminarily, we must note our recognition that seeking to ascertain the parties' true contractual intent regarding whether their agreements belong in the second or third category is a search for a needle in a haystack in which there is good reason to believe no

[6]This contract was made 15 years after *Sierra* and before any change in its interpretation by the Commission.

needle exists. For at the time all of the contracts involved in this petition for review were concluded, it was not clearly understood that the third category existed. *The Supreme Court's opinion in FPC v. Sierra Pacific Power Co., supra, was thought by many, including the Commission itself, to permit only the public-interest standard in § 206 proceedings, see Carolina Power & Light Co.*, 47 F.P.C. 1, 4 (1972). It is quite probable, therefore, that *the parties to the present contracts not only had in mind no specific answer to the question here at issue, but did not even understand that the question could be asked.* Deciding whether to place their contracts in category two or category three may be more in the nature of a policy determination regarding application of *new law to existing contractual arrangements* than of a factual or legal conclusion regarding the meaning of contracts. (Emphasis added).

This error is one of fundamental importance to the administration of the Power Act. There are now 211 jurisdictional electric utilities. Each of these companies has at least one wholesale customer, and most have a plurality of wholesale customers. Many of these customers have Section 206 contracts which have engendered much litigation before the Commission[7] and the Courts[8] on whether the *Sierra*

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[7] *Illinois Power Co.*, 17 FERC ¶61,064 (1981); *Louisiana Power and Light Co.*, 14 FERC ¶61,075 (1981); *Missouri Power and Light Co.*, 7 FERC ¶61,160 (1979); *Southern California Edison Co.*, 53 FPC 921 (1975), affirmed *sub nom., Southern California Edison Co. v. FPC*, 535 F.2d 1325 (D.C. Cir. 1976).

[8] *Louisiana Power and Light Co. v. FERC*, 587 F.2d 671 (5th Cir. 1979); *Public Service Company of New Mexico v. FERC*, 628 F.2d 1267 (10th Cir. 1980), *cert den.*, 451 U.S. 907 (1981); *Papago II, supra; Kansas Cities, supra.*

burden applies. The retroactive application of the radically transformed new law made by the Court below to all wholesale customers previously enjoying *Sierra* status under their contracts, therefore, will have an adverse impact on a large number of wholesale electric power customers.

4. The decision below is in conflict with the decision of this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), and with the recent decision of the U.S.Court of Appeals for the Tenth Circuit in *Southern Union Gas Co. v. FERC*, 725 F.2d 99 (1984), regarding the filed rate doctrine and retroactive ratemaking. Under the "filed rate doctrine," the only rate which may be charged is the rate lawfully on file with the Commission at the time service is rendered by a regulated company. In this case, the rates for PTUA which were actually on file with the Commission for the period from August 1, 1978 to January 25, 1982 had been unilaterally failed by APS. However, the agency's action in permitting that rate filing to become effective had been effectively reversed by *Papago I*. Thus, the only valid filed rates in effect during that period were the preexisting contract rates set forth in the Power Supply Agreement between APS and PTUA. Consequently, in the present case this means that PTUA cannot lawfully be compelled to pay more than the contract rates. PTUA made this precise argument to both the Commission and the Court below, which rejected it without discussion.

However, in *Arkansas-Louisiana* this Court applied the filed rate doctrine to bar a state court suit seeking damages for an admitted breach of contract. It also held that the Gas Act bars a regulated seller from collecting any rate other than the one lawfully on file with the Commission, and prevents the Commission itself from retroactively imposing a rate increase for gas already sold. 453 U.S. at 578. Surely, if, as this Court held in *Arkansas-Louisiana*, a breach of

contract by the buyer does not justify creating an exception to the filed rate doctrine, the decision of the Court below making an exception to that doctrine to achieve the Commission's professed equitable goal of placing all parties in the same position they would have occupied if the agency had correctly ruled, in the first instance, that PTUA is a Section 206, rather than a Section 205, customer certainly is in conflict with *Arkansas-Louisiana*.

In *Southern Union*, 725 F.2d 99, 101-102, Southern Union, a natural gas distributor, had taken delivery of certain volumes of natural gas in violation of the Natural Gas Act. The Commission penalized Southern Union by directing that it pay a higher rate—which had never been on file with the Commission—for the gas illegally delivered to it over a four year period. On petition for review, the Court of Appeals rejected the Commission's argument that the "egregious nature of petitioner's illegal conduct" in violating the Natural Gas Act called for an exception to the filed rate doctrine laid down by this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). It held that the Commission cannot issue reparation orders under the Gas Act.[9] By contrast, the Court below permitted an exception to the filed rate and anti-retroactivity doctrines of the Act, in a case involving neither a breach of contract, *Arkansas-Louisiana*, nor a violation of the Act, *Southern Union*, for the sole purpose of retoactively increasing APS' earnings on service to PTUA. Thus, there is a clear conflict between the decision of another court of appeals and the decision of the Court below.

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[9]In *Sierra* this Court held that the Gas Act and the Power Act are *in pari materia*.

Last, but not least, the Court below in its zeal to do equity for APS exceeded its statutory powers under Section 313(b) of the Power Act "to affirm, modify, or set aside" the order of the Commission. Instead, it exercised the essentially *administrative* function of making its *own independent finding* that the existing contract rate was unreasonable, even though it expressly admitted that it ordinarily would not remedy the Commission's failure to make such a finding, but would reverse that agency for such an abuse of its discretion to make an explicit finding to that effect. *Papago II*, (App. 39-41); *FPC v. Idaho Power Company*, 344 U.S. 17, 21 (1952).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision below should be summarily reserved.

Respectfully submitted,

PAPAGO TRIBAL UTILITY AUTHORITY

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April 10, 1984.

No. 83-1652

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On Petition For a Writ Of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

Appendix to Petition For A Writ of Certiorari

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TABLE OF CONTENTS TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

ORDER ON REMAND OF THE FEDERAL ENERGY REGULATORY COMMISSION JANUARY 25, 1982

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

C.M. Butler III, Chairman;
J. David Hughes and A.G. Sousa.

Arizona Public Service Company) Docket No. ER76-530

ORDER ON REMAND
(Issued January 25, 1982)

This proceeding involves an application filed with the Federal Power Commission in the above-captioned docket on February 26, 1976, by Arizona Public Service Company (Arizona) seeking approval of approximately $4.5 million annually in its rates for wholesale electric service. Among Arizona's wholesale customers affected by the proposed increase are Arizona Electric Power Cooperative, Inc. (AEPCO), Papago Tribal Utility Authority (PTUA) and Electrical District No. 1 (ED-1). In its suspension order of March 31, 1976, the FPC held, over the customers' objections, that Arizona's contracts with AEPCO, PTUA and ED-1 authorized the filing of the proposed increase under section 205 of the Federal Power Act. The FPC accepted Arizona's rates for filing, suspended their operation for 30 days until May 1, 1976, and set the matter for hearing.

The FPC's decision to accept Arizona's proposed section 205 rate increase to the above-noted wholesale customers was appealed to U.S. Court of Appeals for the D.C. Circuit. On August 21, 1979, the court issued its decision in the appeal, *Papago Tribal Utility Authority* v. *F.E.R.C.*, 610 F. 2d 914, holding that the Arizona-AEPCO contract did permit a filing under section 205 of the act, but that the PTUA and ED-1 contracts did not. The court held that the latter agreements authorized rate revisions only prospectively from the date of a Commission order in a section 206(a) proceeding. The court remanded the FPC's suspension and related orders to this Commission for further proceedings consistent with its opinion. The court left open the questions of whether a new proceeding would be necessary on remand and whether the *Mobile-Sierra*[1] burden of proof must be employed in determining any increase in rates to PTUA and ED-1 under section 206.

Meanwhile, the hearing ordered by the FPC was held and concluded. The presiding judge issued his initial decision in the case on December 19, 1977, approving in part Arizona's proposed increase in rates. On August 1, 1978, this Commission affirmed the judge's decision.

On October 9, 1979, PTUA filed a motion requesting the Commission to take a number of actions in the captioned docket and two succeeding Arizona rate dockets[2] in response to the court's decision. In docket No. ER76-530, PTUA requests the Commission to order Arizona to refund all amounts collected in excess of the contract rate and to rule that any rate increase approved as to PTUA under section 206 must meet the full *Mobile-Sierra* burden of proof. On October 12, 1979, Arizona filed a motion for an order on remand. Arizona argues that no further hearings

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[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)

[2] Docket Nos. ER78-145 and ER79-126.

are necessary, that the full *Mobile-Sierra* burden of proof need not be met, and that the Commission approved rates should be applied to PTUA and ED-1 as of August 1, 1978, the date of the Commission's final decision herein. PTUA answered in opposition to Arizona on October 29, 1979; Arizona answered in opposition to PTUA on October 31; and on November 7, PTUA filed a reply to Arizona's response.

On October 30, 1979, ED-1 filed a motion for an order on remand and a response to the Arizona and PTUA motions. ED-1 argues that under the provisions of Commission-approved settlement agreements in Docket Nos. ER77-521 and ER78-145, the parties agreed that if the court's decision did not clearly decide the burden of proof issue, which in fact it did not, the parties would "meet and seek to settle" any questions arising from the court's decision. ED-1 argues that the Commission should rule that the motions of both Arizona and PTUA are premature. It requests the Commission to convene a conference pursuant to section 1.18 of the rules of practice and procedure and the settlements for the purpose of determining the issues presented by the court's decision. ED-1 also expresses opposition to Arizona's request that the Commission enter an order making the previously approved rates effective in Docket No. ER76-530 as of August 1, 1978.

Insofar as the present Docket No. ER76-530 is concerned, the Commission does not agree with ED-1 that the motions of Arizona and PTUA are premature. Arizona points out that the settlement provisions require a settlement conference only if the court's decision does not clearly rule as to the burden of proof issue and if subsequent

proceedings ordered by the court do not settle this question. In this order the Commission shall, in accordance with the court's remand, consider and decide the burden of proof issue. Consequently, there does not appear to be any need for a settlement conference on this issue in this docket either under the settlement agreements or otherwise. In view of the respective positions of PTUA and ED-1 on the one hand and Arizona on the other, it is clear that a settlement conference on the burden of proof issue would be unavailing in any event. ED-1's request to defer action in this docket pending a conference among the parties is therefore denied.

With respect to the motions for an order on remand, the Commission finds itself in agreement with Arizona and will adopt its recommendations. Despite the extensive arguments raised by PTUA, we find its position to be without merit.

First, with respect to the matter of burden of proof, we find no basis to require that the stringent *Mobile-Sierra* burden of proof be made applicable. It is our view that the *Mobile-Sierra* cases establish the applicable standards governing rate increases which may be allowed in cases where the utility and its customer have entered into a fixed rate contract, that is a contract which does not authorize the utility to seek an increase under either sections 205 or 206. Under *Mobile-Sierra,* a utility with a fixed rate contract is theoretically entitled to a rate increase notwithstanding the contract if it can show that the contract rate is "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other customers and excessive burden, or be unduly discriminatory." (350 U.S. 355). The burden of proof in such cases is extremely difficult if not impossible to meet. We are not aware of any case arising under the Federal

Power Act in which rate relief has been granted under the *Mobile-Sierra* standard. See *e.g.* Opinion No. 764, *Metropolitan Edison Company*, Docket No. E-8832, issued June 1, 1976.

The contracts at issue here, however, are not fixed rate contracts. The language of the Arizona-PTUA contract reads in pertinent part as follows:

> 3.6 The rates hereinabove set out in this Section 3 and Exhibits thereto are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, *with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other regulatory authority in connection with changes which may be desired by such party.* (emphasis added)

We hold that under the terms of this contract, Arizona was entitled unilaterally to file a rate increase application with the Commission, but that, consistent with the court's decision herein, any increase ultimately approved can be made effective only prospectively. The latter circumstance, however, does not lead to the conclusion that the *Mobile-Sierra* burden of proof must be applied in determining the rates to be allowed. While the contracts in question admittedly do not specify whether a rate increase request by Arizona would be considered under section 205 or 206 of the Act, nevertheless, there can be no reasonable doubt that the contracts authorize the filing of a rate increase application by Arizona. These contracts are therefore not fixed rate

contracts and the law of the *Mobile* and *Sierra* cases is not applicable to them. To apply the *Mobile-Sierra* standard, thereby effectively precluding any change in the contract rate, would in our judgment be arbitrary and grossly unfair, as well as directly contrary to the express terms of the contracts. We find no basis in the parties contracts, the statute, or the applicable case law requiring imposition of the *Mobile-Sierra* burden of proof in a case such as this. We believe the proper standard is the just and reasonable standard incorporated in section 206 and that in accordance with the standard, Arizona's rates should be determined by reference to its fully allocated costs, consistent with the Commission's normal ratemaking methods. Accordingly, we conclude the *Mobile-Sierra* burden of proof does not apply.

We likewise reject the proposition that a new proceeding is required as a result of the court's order.[3] The hearing in this docket was held under sections 205 and 206 of the act. Both sections provide for the establishment of just and reasonable rates; the principal difference between them is the suspension and refund procedures of section 205 as contrasted with the prospective effect of orders resulting from proceedings under section 206. It appears to us that to hold a new hearing in this docket would be duplicative of the hearing already held and would represent a waste of the Commission's resources as well as the parties' resources, all with the likelihood that any decision reached would conform to that already rendered.

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[3]The court in *Papago* specifically stated that its decision was not meant to imply that a new proceeding would be required. *See* 610 F. 2d 930, footnote 127.

We believe the most reasonable thing to do under the circumstances is to make the rates heretofore approved in this docket applicable to sales to PTUA and ED-1 effective on August 1, 1978, the date of the Commission's final decision in this docket. The effect of this action would be to place all parties in the position they would have been in had the FPC in its prior orders interpreted the PTUA and ED-1 contracts as required by the court's decision. We firmly believe the Commission has the responsibility and authority to place the parties in the same position they would have been in if the FPC had ruled correctly in the first instance.

Section 206 requires the utility's pre-existing rates be found by the Commission to be unjust, unreasonable, unduly discriminatory or preferential before new just and reasonable rates can be approved and made effective. We have examined Arizona's pre-existing rates in relation to the costs found in the order of August 1, 1978, to be properly allocable to PTUA and ED-1. Our review indicates that the existing rates produce a return which is unreasonably low.[4]

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[4]Based on data contained in Arizona's compliance filing of November 3, 1978, in this docket, Arizona's earned rate of return at existing rates on its service to PTUA would be .552 percent. A similar comparison for ED-1 is not possible since the service did not commence until March 22, 1976. Test year revenue data for the ED-1 service are not available in the record. However, the rate approved in the order of August 1, 1978, applicable to ED-1 is substantially higher than the pre-existing rate. To the extent of difference between the old and new rates the old rate is less than compensatory based on fully allocated costs and resulted in a rate of return below that found in this proceeding to be just and reasonable. The rate approved for ED-1 is the same as the rate approved for Arizona's other irrigation resale customers. As to those cutomers, whose rates were established under section 206, the presiding judge specifically found that the pre-existing rates were unjust, unreasonable and unlawful and that Arizona should be permitted prospectively to increase such rates to the just and reasonable level. We conclude that

Continuation of the existing rates would not allow Arizona to earn the just and reasonable rate or return (9.41 percent) approved in the August 1, 1978, order. On this basis we conclude that the existing rates are not just and reasonable under the standard of section 206(a) and should be adjusted as of August 1, 1978, to conform to the just and reasonable rates established by the Commission in this docket.

On January 14, 1980, intervenor Citizens Utilities Company (Citizens) filed a motion seeking essentially the same relief as PTUA. It appears however that Citizens' motion has subsequently become moot. In a settlement approved by the Commission on November 13, 1981, in docket No. ER81-179, Citizens agreed that Arizona's rate filings affecting Citizens, including that in Docket No. ER76-530, were properly held to be subject to section 205 of the Federal Power Act. As part of the settlement, Citizens agreed to abandon and retract its pending motions seeking relief based on the non-applicability of section 205. Based on these facts Citizen's motion of January 14, 1980, is deemed withdrawn.

On September 28, 1981, PTUA filed a petition requesting the Commission to reopen the record in this case for an evidentiary hearing on the burden of proof issue. Basically PTUA argues that it was the understanding of the parties at the time the Arizona-PTUA contract was negotiated in 1971 that the rate specified in the contract was intended to be in

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Arizona's pre-existing rate to ED-1 must likewise be considered unjust and unreasonable under the terms of section 206 and should be adjusted as of August 1, 1978, to conform to the just and reasonable rate. We perceive no reasonable basis or legal requirement to establish a rate for ED-1 different from that approved in the August 1, 1978, order for Arizona's other section 206 irrigation resale customers.

the nature of a fixed rate and can be increased only if the so-called *Mobile-Sierra* burden of proof is met by Arizona.

In support of its request, PTUA cites to an order issued on September 24, 1981, in Arizona's rate docket ER81-179, in which the Commission referred to the rate change provision of the Arizona-PTUA contract as ambiguous. PTUA argues that where an ambiguity exists, the Commission must look beyond the four corners of the contract and must analyze the parties' intentions at the time the contract was entered into. PTUA provides four exhibits consisting of affidavits from two individuals involved in the negotiation of the Arizona-PTUA contract[5] and two contemporaneous (1970) letters from Arizona, one to PTUA and the other to R.W. Beck and Associates, submitted in connection with contract. PTUA submits these exhibits as evidence of the parties' intent to place a limit on Arizona's future rate increases. On October 2, 1981, PTUA filed a supplement to its petition to reopen accompanied by several additional documents.[6]

On October 9, 1981 Arizona filed a preliminary response in opposition to PTUA's petition to reopen and on November 16, 1981, filed its answer. Arizona argues that

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[5]Mr. John T. McGue, member of PTUA's board of directors; Mr. G.I. Valdez, former project controller for Hecla Mining Company (PTUA was purchasing power from Arizona for resale to Hecla for use at Hecla's copr . .nining operations on the Papago reservation).

[6]These documents include (1) a draft of the Arizona-PTUA contract dated January 19, 1971, (2) a Hecla Mining Company internal memorandum dated December 15, 1970, (3) a Hecla internal memorandum dated July 1, 1970, (4) a draft of PTUA's proposal to provide service to Hecla, (5) technical explanations of contract adjustment factors and rate components apparently prepared by Arizona and provided by PTUA to Hecla, and (6) a September 1, 1970, internal Hecla memorandum.

the Arizona-PTUA contract imposes no restriction on Arizona's right to seek rate changes. It further argues that relevent contemporaneous documents, notably the May 28, 1971, contract between PTUA and Hecla Mining Company, compel the conclusion that all parties recognized Arizona's right to seek a rate change after expiration of the initial one year term of the contract. PTUA filed a reply on December 2, 1981.

The basic question involved in this dispute is what was the parties' intent. *Pennzoil Company et al.* v. *F.E.R.C.*, 645 F.2d 360, 388 (C.A. 5 1981). More specifically the question is whether, notwithstanding the specific rate change provisions of the Arizona-PTUA contract, the parties intended that there should be a limit or restriction upon Arizona's right to seek rate changes.

We conclude that the language of the contract is not reasonably susceptible to the interpretation suggested by PTUA. *Lucie v. Kleen-Leen, Inc.*, 499 F.2d 220 (7th Cir. 1974). Section 3.1 of the Arizona-PTUA contract sets out the initial contract rates and states that such rates shall be "applicable during the initial one (1) year period hereof, and thereafter unless and until changed as hereinafter provided in section 3.6 hereof. . ." Section 3.6 of the contract has been referred to earlier and is quoted on page 4 of this order. This section provides that after one year either party to the contract is free unilaterally to seek changes in rates "which may be desired by such party." Section 3.6 contains no limitation such as that suggested by PTUA and in our judgment there is no credible evidence upon which to conclude that such a limitation was intended by the contracting parties.

Inasmuch as the proffered documents attempt to modify or contradict rather than to explain or interpret the contract language, the Commission is not required to consider them further. Since, however, the Commission has reviewed the documents to determine their purpose, we further conclude from our review that none of these documents supports the conclusion that the parties contemplated the rate change limitation suggested by PTUA. We decline to give substantial weight to the affadavits. These latter documents were prepared long after the relevant contracts were negotiated, they are subjective and largely self-serving, and they do not demonstrate mutuality of intent.

The Commission further finds that the order of September 24, 1981, in Docket No. ER81-179 in no way supports PTUA's petition to reopen. The ambiguity mentioned by the Commission in that order referred to the basic issue before the court in *Papago*, namely whether the contract provided for a rate change under section 205 or 206 of the Federal Power Act. The question there was whether the company's rate increase could become effective following suspension under section 205 or whether it could become effective only prospectively under section 206. The court adopted the latter interpretation thereby removing the ambiguity.

The Commission orders:

(A) Within 75 days from the date of this order, Arizona shall refund to PTUA and ED-1 all increased amounts collected from them in this docket prior to August 1, 1978, together with interest at the rates specified in section 35.19a of the Commission's regulations. Within 10 days thereafter

Arizona shall submit a statement showing the computation of refunds and interest paid.

(B) PTUA's petition to reopen the record is denied.

(C) Upon compliance of Arizona with the terms of paragraph (A) above, this proceeding shall be terminated.

By the Commission.
Commissioner Hughes Concurred with a separate statement attached.

Kenneth F. Plumb,
Secretary.

Arizona Public Service Company) Docket No. ER76-530

(Issued January 25, 1982)

HUGHES, COMMISSIONER, *concurring:*

I welcome an opportunity to express separately my views on the difficult questions that this Commission must contend within the area of contractual provisions limiting utilities' ability to effect rate changes. More particularly, I wish to express some reservations I have about the order issued by the Commission in this case insofar as it seems to create two standards within section 206 of the Federal Power Act.

It is my opinion that section 206 contains but a single standard by which the Commission can disallow existing

rates and charges and that standard is defined by the phrase "unjust, unreasonable, unduly discriminatory or preferential." I have doubts as to the wisdom of following a procedure by which that statutory standard may be altered or given different meanings by the wording of a contract between a utility and its customer. A more fundamentally sound approach is to view the standard as a unitary one, but to look to a contract to determine the extent to which a utility has, by contract, limited or foresworn its right to invoke its pre-existing rights under either section 205 or section 206 of the Power Act.

Specifically, the order states, at page 4:

> We believe the proper standard is the just and reasonable standard incorporated in section 206 and that in accordance with the standard, Arizona's rates should be determined by reference to its fully allocated costs, consistent with the Commission's normal ratemaking methods. Accordingly, we conclude the *Mobile-Sierra* burden of proof does not apply.

This discussion, perhaps unintentionally, seems to proceed from a notion that there is a *Mobile-Sierra* standard that is somehow different from the just and reasonable standard that applies, for instance, to this case. The ambiguity lurking in that notion may be dispelled by noting that the Commission refers to *Mobile-Sierra* as a *burden of proof*, not a *standard*. And that, I think, comes closer to my understanding of these cases. A full-Sierra contract does not establish a different standard than a moving-Mobile contract, but acts instead as a limitation on the arguments and proofs a utility can advance to satisfy the standard. The D.C. Circuit concluded in the decision remanding this case to us, *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 at 929 (D.C. Cir. 1980):

> As we have had occasion to observe, the *Mobile-Sierra* doctrine is "refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." [footnote deleted]

It may be useful to begin this analysis with a review of the options available to a utility outside of any contractual commitments. First, it may establish a rate change upon 60 days notice following the procedures of section 205(d) of the Power Act. A second option recognizes that the company is free to establish any effective date for new rates beyond 60 days in the future.[1] Under this option, it may specify that the rates will become effective upon the Commission's issuance of a substantive order. A utility has, as a third option, the right to complain under section 206 against its own rates, that it, petitioning the Commission to investigate their justness and reasonableness and upon a finding that they are not just and reasonable to establish new rates, hoping, of course, that the Commission will prescribe the rates suggested by the utility.

The *Mobile-Sierra* line of cases teaches that a utility may by contract bargain away some of these options or agree to conditions precedent to their exercise. In the simplest case, a utility gives up its right to file rate increase to be effective on 60 days notice. It then preserves the right to file rate increases subject to section 205(d), but to be effective only

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[1] 18 C.F.R.§35.3(a) requires Commission permission for an effective date more than 120 days from the filing date. In addition, 18 C.F.R. §35.2(e) seems to require a Commission waiver for any effective date other than 60 days after filing.

after a Commission order. It can also foreswear that right, as the court found the utility to have done in this case. The utility has closed off all its avenues under section 205, but still retains the right to file a complaint under section 206 to cause the Commission to investigate its rates. In the special situation of the fixed rate contract, as was present in the *Mobile* and *Sierra* cases, the company can be found to have foresworn the right to invoke section 206 *for its own interest,* and thus its complaint under section 206, while still invoking the just and reasonable standard, must invoke a public interest rather than its private interests as the predicate to the Commission's finding that its rates and charges are not just and reasonable. It is worth emphasizing that what is ultimately to be protected through any exercise of our section 205 and 206 powers is a public interest in prices that are fair to both buyer and seller of electric power. The Power Act does not give primacy either to economic health of the utility or to consumer protection. It requires us to pursue both goals, because in the end, one is meaningless if the other is trammeled. That is why section 206 is a two-way street which enables the Commission to make upward, downward to lateral rate adjustments required to fulfill the ultimate public purposes of the Act.

In discussing the distinctions between procedures under section 205 and section 206, the courts in the *Mobile-Sierra* cases and in later Court of Appeals cases have focussed on differences in the timing of rate increases.[2] Other distinctions are more subtle, but perhaps sometimes more important.

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[2]Under Section 206, rate changes can take effect only prospectively from the date of a Commission order, but as I have said above, that result is also available to a utility under section 205 procedures. Section 205, on the other hand, absent a contractual bar, permits increases to become effective on 60 days notice subject to the Commission's power to affect the timing of an increase through the suspension and refund mechanisms, but these would be nonsensical in connection with a prospective increase.

The first is the conceptual focus and required findings of an investigation. In a section 205 case, the existing rates are extinguished by the mere fact of the utility's filing, either at the effective date designated by t. e utility or at the end of any suspension period set by the Commission. Under section 206, however, the lawfulness *vel non* of existing rates is, in a juridical sense, the central issue at the outset of the investigation. Existing rates can be extinguished only if the commission finds them unjust and unreasonable. And that finding is a necessary predicate which must be met before the commission can prescribe new rates to be effective prospectively. Thus, a section 206 case automatically involves both an inquiry into the old rate levels and into the new rate levels. This distinction is not often meaningful during the trial of a case under the Commission's current practice,[3] but it cannot be ignored in the Commission's final disposition or on judicial review.

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[3]We recently discussed this in *Illinois Power Company*, 17 FERC ¶ 61,064, at footnote 7:

> We note that there is little practical difference in a non-Sierra Section 206(a) and a Section 205-with-a-prospective-effective-date proceeding. In both cases, no rates are collected subject to refund or prior to Commission approval of the new rate level. The only important difference is whether the Commission must find the proposed new rate unjust and unreasonable before setting the lawful rate, or whether it must find the old contract rate unjust and unreasonable before setting the lawful rate. Since proposed rates are evaluated from the ground up in either case, as discussed *infra*, there is little difference in results. We note that in the past the Commission has interpreted similar contract language (absent extrinsic evidence to the contrary as is present here) as providing for a section 206(a) proceeding with a just and reasonable burden of proof. See

A second distinction, highlighted in *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C.Cir. 1980), cert. denied October 5, 1981 is the allocation of the burden of proof. Ordinarily, under section 205 the utility must carry the burden of supporting increases in its rates.[4] Under section 206, the Commission may well ber the burden of supporting the prescribed rate even if the moving party has carried the initial burden of proving the existing rate unjust and unreasonable under the Administrative Procedure Act, 5 U.S.C. §556(d). I think it is undesirable as an ordinary matter for the Commission to be in the position of bearing the burden of establishing rate increases sought by utilities and I think that in most instances it would be advantageous for a utility to carry that burden itself, since its revenues are at risk. For these reasons, it would seem to me best for the Commission, as its general policy, to require a clear expression in a contract that a company has sworn away its rights to use section 205

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i.e., pp. 5-6, *supra*. However, this was because the Commission, prior to the *Kaukauna* case [*City of Kaukauna v. FERC*, 581 F.2d 993 (D.C. Cir. 1978)] believed that a section 206(a) proceeding was the only course available under the Federal Power Act for achieving a prospective only effective date. The Court in *Kaukauna* made it clear that this was not the case and that a section 205 proceeding with a delayed effective date could also achieve this result and must be considered as a possible interpretation of such a contract. 581 F.2d at 997-8.

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[4]In the *Public Service Commission* decision, known more familiarly as the Transco decision, the Court held that the Commission had the burden of proof as to a modification of the utility's filed rate design, where that modification involved use of the Commission's powers under section 5 of the Natural Gas Act, which is the courterpart of section 206 of the Power Act.

rate-changing procedures. Thus, I would be disposed to resolve most contractual ambiguities in favor of a prospective section 205 filing rather than a section 206 requirements.

The court in this case, however, was not presented with the *Kaukauna* option. The Commission had decided that the contract language here in dispute permitted a garden-variety suspendible section 205 filing. The Court held squarely that the Commission was wrong and accepted the customers' argument that a section 206(a) filing was intended. The Court's language leaves us no choice but to treat this as a section 206 case. Accordingly there has been no need for me to consider whether the contract language in this case is susceptible of a *Kaukauna* interpretation, or what other language might permit that interpretation.

As to the remaining steps in this decision, I am in full agreement with my colleagues. There is no suggestion in this proceeding that the company has foresworn its right to invoke its own private interest through a section 206 complaint filing. This case, therefore, is not a *Sierra* case. I further agree that in today's circumstances, the contract rates for Papago Tribal Utility Authority are unjust and unreasonable to the company and that the contract rates for the Electric District 1 are unduly discriminatory and for that reason are unjust and unreasonable. The Commission's prescription of new just and reasonable rates in the instant order is, therefore, entirely proper.

J. David Hughes

APPENDIX B

NOTICE OF DENIAL OF APPLICATION FOR REHEARING ISSUED BY THE FEDERAL ENERGY REGULATORY COMMISSION MARCH 26, 1982

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Arizona Public Service Company	)	Docket No. ER 76-530-001

NOTICE OF DENIAL OF APPLICATION FOR REHEARING

(Issued March 26, 1982)

On February 24, 1982, Papago Tribal Utility Authority filed an application for rehearing of the Commission's order issued in captioned proceeding on January 25, 1982.

Take notice that the Commission agreed at its meeting of March 23, 1982, to take no action on the application for rehearing, and accordingly the application is denied pursuant to section 1.34(c) of the Commission's rules of practice and procedure.

Kenneth F. Plumb,
Secretary.

APPENDIX C

PAPAGO TRIBAL UTILITY v.
FEDERAL ENERGY REGULATORY COMMISSION,
723 F.2d 950 (D.C. Cir., 1983)

APPENDIX C

PAPAGO TRIBAL UTILITY AUTHORITY, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent,

Arizona Public Service Company, Intervenor.

Nos. 82-1338, 82-1339.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 21, 1983.

Decided Dec. 13, 1983.

As Amended Dec. 22, 1983.

Before EDWARDS and SCALIA, Circuit Judges, and VAN DUSEN,* Senior Circuit Judge of the United States Court of Appeals for the Third Circuit.

Opinion for the Court filed by Circuit Judge SCALIA.

SCALIA, Circuit Judge.

Papago Tribal Utility Authority petitions under 16 U.S.C. §825*l* (b)(1982) for review of an order of the Federal Energy Regulatory Commission approving an increase in rates paid to the Arizona Public Service Company. The issues on appeal are whether the parties' contract authorized the Commission to fix "just and reasonable" rates, whether the Commission's finding under § 206(a) of the Federal Power Act that prior rates were unjust and unreasonable was procedurally and substantively sound, and whether the new rates could be made effective as of a date before that explicit finding was made.

*Sitting by designation pursuant to 28 U.S.C. §294(d).

On February 26, 1976, the Arizona Public Service Company ("APS") filed with the Federal Power Commission a Notice of Rate Change affecting electricity rates to its wholesale for resale customers, including the Papago Tribal Utility Authority ("PTUA"). PTUA filed a *Protest, Petition to Intervene,* and *Motion to Reject,* alleging, inter alia, that its contract with APS did not permit unilaterally proposed rate changes under §205 of the Federal Power Act, 16 U.S.C. § 824d (1982). The Federal Power Commission held to the contrary, and permitted the filed rates to take effect May 1, 1976, pending investigation into their lawfulness and subject to refund on the basis of that investigation. *Arizona Public Service Co.*, 55 F.P.C. 1503, 1507-08 (1976) *(Order Accepting in Part, Rejecting in Part, etc.); Arizona Public Service Co.*, 56 F.P.C. 1834, 1837-38 (1976) (*Order Denying Application for Rehearing, etc.).* On August 1, 1978, the Federal Energy Regulatory Commission, statutory successor to the Federal Power Commission,[1] approved the proposed rates as just and reasonable, subject to minor adjustment and to corresponding refund for the period during which the unadjusted rates had been in effect. *Arizona Public Service Co.*, 4 FERC (CCH) ¶ 61,101 *("Order Affirming Initial Decision").*

In a previous appeal, this court disagreed with the Commission's interpretation of the contract between APS and PTUA, holding that it did not contemplate unilateral change under §205 of the Act, *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission,* 610

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[1]In 1977, most functions of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission. Department of Energy Organization Act, Pub.L. No. 95-91, § 402(a), 91 Stat 565, 583-84 (codified at 42 U.S.C. 7172(a) (Supp. V 1981)).

F.2d 914, 930 (1979) (*"Papago I"*). Reconsidering the contractual language on remand, the Commission found that it authorized a Commission-initiated proceeding to set just and reasonable rates under § 206 of the Act, 16 U.S.C. § 824e (1982). *Arizona Public Service Co.*, 18 FERC (CCH) ¶ 61,066, at 61,110 (Jan. 25, 1982) (*"Order on Remand"*). Concluding that a new hearing would be duplicative and wasteful, the Commission made an explicit finding (for the first time) that APS's pre-existing rates were not "just and reasonable," and made the rates approved in its 1978 Order effective from August 1, 1978 so as to put the parties in the position they would have occupied had the Commission initially interpreted the contract as later required by *Papago I*. *Id.* PTUA's *Application for Rehearing* was denied on March 26, 1982, *Arizona Public Service Co.*, 18 FERC (CCH) ¶62,582; this petition for review followed.

THE RATE-CHANGE STANDARD UNDER THE APS/PTUA CONTRACT

The Federal Power Act provides two routes for changing electricity rates: The seller may initiate rate changes under § 205 of the Act, by filing a new schedule, which is subject to Commission review for justness and reasonableness, but which takes effect immediately (after the sixty-day notice period required by subsection (d)), subject to Commission suspension of no more than five months pending investigation;[2] and the Commission itself may initiate rate

[2]Section 205, 16 U.S.C. § 824d (1982), provides:

> (a) All rates and charges made . . . by any public utility for or in connection with the transmission or sale of electric energy . . . shall be just and reasonable, and any such rate or

changes (usually, of course, upon application of one of the parties to the contract) under § *206, but only upon finding that the existing rates are unjust, unreasonable, unduly discriminatory or preferential.*[3]

These provisions permit essentially three contractual arrangements for revision. First, the parties may agree that new rates can be unilaterally and immediately imposed by the utility, subject, under § 205, to Commission

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charge that is not just and reasonable is hereby declared to be unlawful.

. . . . . .

(d) [N]o change shall be made by any public utility in any...rate...except after sixty days' notice.... Such notice shall be given by filing with the Commission...new schedules....

(e) Whenever any such new schedule is filed the Commission shall have authority...to enter upon a hearing concerning the lawfulness of such rate...; and, pending such hearing and the decision thereon, ...may suspend the operation of such schedule and defer the use of such rate,...but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings...the Commission may make such orders with reference thereto as would be proper in a proceeding inititated after it had become effective.

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[3]Section 206(a), 16 U.S.C. § 824e(a) (1982), provides:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate...collected by any public utility...is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate...to be thereafter observed and in force, and shall fix the same by order.

suspension for no longer than five months, and to ultimate Commission disallowance if they are not just and reasonable. Second, by broad waiver, the parties may eliminate both the utility's right to make immediately effective rate changes under § 205 and the Commission's power to impose changes under § 206, except the indefeasible right of the Commission under § 206 to replace rates that are contrary to the public interest, "as where [the existing rate structure] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[4] *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355, 76 S.Ct. 368, 372, 100 L.Ed. 388 (1956). Third, the parties may contractually eliminate the utility's right to make immediately effective rate changes under § 205 but leave unaffected the power of the Commission under § 206 to replace not only rates that are contrary to the public interest but also rates that are unjust, unreasonable, or unduly discriminatory or preferential to the detriment of the contracting purchaser. *See Public Service Co. of New Mexico v. FERC*, 628 F.2d 1267, 1270 (10th Cir. 1980), *cert. denied*, 451 U.S. 907, 101 S.Ct. 1974, 68 L.Ed.2d 295 (1981); *Louisiana Power & Light Co. v. FERC*, 587 F.2d 671, 676 (5th Cir. 1979). The first issue in the present case is whether the Commission was correct in concluding that the APS/PTUA contract adopted the last of these three

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[4]This apparently means unduly discriminatory or preferential to the detriment of purchasers who are not parties to the contract. Discrimination or preference that operates against the contracting purchaser can presumably be waived—just like unreasonableness—up to the point where it produces some independent harm to the public interest.

regimes. In approaching that question, we accord appropriate deference, though not of course conclusive validity, to the judgment of the expert agency that deals with such contracts regularly. *Kansas Cities v. FERC*, No. 81-2248, 723 F.2d 82 at 87 (D.C.Cir.1983).

The portion of the APS/PTUA contract that governs rates is Section 3. It sets forth a base monthly rate and a base monthly minimum, the former consisting of local facilities charge, demand charge, and energy charge, each subject to monthly adjustment. It also permits adjustments for reductions in maximum demand attributable to cancellation of PTUA contracts with third parties. Subsection 6, the last subsection of section 3, provides:

> The rates hereinabove set out in this Section 3 . . . are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party.

In *Papago I*, we held that the contract did not permit unilaterally effected rate increases under § 205. In its *Order on Remand*, the Commission held that the contract permitted changes under § 206 on the basis of a just-and-reasonable standard.

PTUA makes essentially three objections to the Commission's conclusion. First, that the language of the contract excludes just-and-reasonable changes; second, that apart from the language, the reasoning of *Papago I* requires

such a conclusion; and third, that the issue deserved an evidentiary hearing. We find none of these objections well taken.

PTUA contends that the contractual language merely recognized the possibility of future rate change and that such recognition does not constitute an agreement to apply a just-and-reasonable standard in § 206 proceedings. We disagree. The contract draws a clear distinction between "the initial one (1) year," during which the originally specified rates "are to remain in effect," and subsequent years, during which those rates are to subsist "unless and until changed by the Federal Power Commission or other lawful regulatory authority." The limitation envisioned during the initial year cannot abridge the right of the parties to bring to the attention of the Commission during that period rates not in the public interest. The Commission's obligation to insure that rates do not violate that prescription is imposed for the direct benefit of the public at large rather than (like the prescription of just and reasonable rates) for the direct benefit of the seller and purchaser; and it therefore cannot be waived or eliminated by agreement of the latter. Even agreement not to bring a rate contrary to the public interest to the Commission's attention would be akin to a contract to suppress evidence, and therefore void. *See* RESTATEMENT OF CONTRACTS § 554 (1932); 14 WILLISTON ON CONTRACTS §1716 at 881 (3d ed. 1972); 6A CORBIN ON CONTRACTS § 1430 at 380 (1962). Thus, applying the principle that a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful (*ut magis valeat quam pereat*), the restriction envisioned during the first year of the contract must allow

rate changes required by the public interest. The scheme to be in effect "thereafter" — obviously intended to be less restrictive—must therefore permit changes that are just and reasonable.

Moreover, specific acknowledgment of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard. The public-interest standard is practically insurmountable; the Commission itself is unaware of any case granting relief under it. *Order on Remand*, 18 FERC (CCH) ¶ 61,066 at 61,109. Future rate changes would be a dim prospect, hardly worthy of recognition, if the parties did not intend the just-and-reasonable standard to govern. All but one of the cases cited by petitioner in which a contractual recognition of alteration by regulatory action was held to establish only a public-interest standard involved clauses recognizing the possibility of regulatory change in general, not rate change in particular. *See* cases discussed in *Kansas Cities, supra*, at 87-88. In the one exception,the issue was neither discussed nor understood.[5]

PTUA contends that the contract's provisions for automatic adjustment in the base monthly rate reflect an intent to restrict other rate changes as much as possible. There is some force to that argument, but we cannot say that

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[5]In *Carolina Power & Light Co.*, 47 F.P.C. 1 (1972), the Federal Power Commission adopted a hearing examiner's conclusion that the relevant contract did not permit §205 changes. It was only in connection with that issue that the hearing examiner had considered the regulatory change provision. *Id.* at 13-14. And once that issue was resolved, the Commission automatically scheduled hearings in which the utility was to satisfy the public-interest standard—in the belief that *FPC v. Sierra Pacific Power Co., supra*, made that standard applicable in all §206 proceedings. *Id.* at 4. As our earlier discussion indicates, that early interpretation of *Sierra* was incorrect.

it overcomes the strong textual argument based upon the separate provision for changes before and after the first year of the contract. The automatic adjustments are of course not rendered entirely superfluous if just and reasonable rate revisions are allowed. Since reasonableness is not a fixed point but a zone, *see FPC v. Conway Corp.*, 426 U.S. 271, 278, 96 S. Ct. 1999, 2004, 48 L.Ed.2d 626 (1976); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86, 62 S.Ct. 736, 742-43, 86 L.Ed. 1037 (1942), there would be scope for operation of the adjustment provisions before the factors producing the adjustment took the rate entirely outside the zone of reasonableness.

Finally, our decision in *Papago I* did not restrict § 206(a) increases under this contract to those in the public interest. The opinion held that the second clause of subsection 3.6 does not permit unilateral rate changes under § 205, but "simply preserves the right of either party to petition the Commission for relief pursuant to Section 206(a)," 610 F.2d at 928. It did not address the standard of proof to be applied in the § 206 proceeding, and indeed explicitly disclaimed any ruling on that point. *Id.* at 930 n. 127. As for its invocation of the canon that ambiguous contracts are to be construed against the drafter: That canon does have force with regard to the point at issue in *Papago I*, since application of § 205 invariably favors the utility. The adoption of a strict or lenient standard for rate change, however, does not necessarily favor either side, since its effect will depend upon whether upward or downward revision is sought. *See Kansas Cities, supra*, at 87.

PTUA also objects to the Commission's refusal to consider evidence extrinsic to the contract with regard to

this issue of interpretation, including such matters as proposals put forward in the negotiations and eliminated in the final contract. We have held with specific reference to this issue or rate revision in federal power contracts that " '[i]n the absence of ambiguity the intent of the parties to a contract must be ascertained from the language thereof without resort to parol evidence or extrinsic circumstances.' " *Appalachian Power Co. v. FPC*, 529 F.2d 342, 347-48 (D.C.Cir.1976) (footnote omitted) (quoting *Simpson Bros. Inc. v. District of Columbia*, 179 F.2d 430, 434 (D.C.Cir.1949), *cert. denied*, 338 U.S. 911, 70 S.Ct. 350, 94 L.Ed. 561 (1950)). And as we have noted in other contexts, "[a] contract is not ambiguous simply because the parties disagree on its interpretation." *Clayman v. Goodman Properties, Inc.*, 518 F.2d 1026, 1034 (D.C.Cir.1973) (footnote omitted). Rather, the "standard for determining ambiguity [that] appears to be in fairly general use by American courts" is whether the contract is " 'reasonably susceptible of different constructions or interpretations.' " *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C.Cir.1979) (footnotes omitted) (quoting *1901 Wyoming Ave. Coop. Ass'n v. Lee*, 345 A.2d 456, 461 n. 7 (D.C. 1975)). In rejecting the proffer of extrinsic evidence, the Commission specifically found that "the language of the contract is not reasonably susceptible to the interpretation suggested by PTUA." *Order on Remand*, 18 FERC (CCH) ¶ 61,066 at 61,111. We think it proper to give the Commission the same degree of deference with regard to this issue as we accord it with regard to the ultimate question of the meaning of the contract. In light of the analysis of the contractual terms set forth above, we sustain the refusal to consider extrinsic evidence.

VALIDITY OF THE FINDING THAT EXISTING RATES WERE NOT JUST AND REASONABLE

PTUA makes procedural and substantive attacks on the Commission's holding that the existing rates were not just and reasonable. It argues that the finding that APS would only earn a .552 percent rate of return under the existing rate schedule lacked substantial evidence and that the Commission's reliance on the compliance filing, which was made before the justness and reasonableness of existing rates was at issue, was unfair.

We find the first claim wholly without merit. The Commission's .552 percent figure was derived from the application of standard ratemaking principles to data from the compliance filing. Brief for Respondent at 20 n. 15.[6] PTUA has neither refuted the data nor disputed the principles nor questioned the accuracy of the computation.

PTUA's procedural claim is similarly ill founded. The compliance filing was part of the record, *see* R. 4127-4311. When it was originally submitted, PTUA had ample opportunity and incentive to challenge any inaccuracies. PTUA's assertion that its challenge to the compliance filing "would have been out of order" because it did not contend lack of compliance with the Commission's orders, Reply Brief at 20, is of course circular. If it believed the filing contained significant factual inaccuracies, it could and should have made such a contention. It is true that at the time the compliance filing was made PTUA believed that it would be used only for the purpose of fixing new rates and not in addition for the purpose of showing the

[6]We note that some of the page citations set forth in the Commission's brief for the figures used in this computation are inaccurate; their substance,however, is correct.

unreasonableness of old rates. But that establishes, at most, that PTUA "would have tried harder" if the full ultimate use of the data had been known—a complaint we have elsewhere found inadequate to excuse failure to challenge. *Association of Massachusetts Consumers, Inc. v. SEC*, 516 F.2d 711, 716 (D.C.Cir.1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976). Moreover, the *Order on Remand*, by alluding to the compliance filing, made it clear that it was being used by the Commission to determine the reasonableness of the old rates, and thus provided "sufficient detail to allow for meaningful adversarial comment" in that specific context, *United States Lines, Inc. v. FMC*, 584 F.2d 519, 535 (D.C.Cir.1978). PTUA declined to make such comment in its *Application for Rehearing*, identifying not a single element of inaccuracy in the compliance filing, and making only the same generalized demand put forth here, that a new opportunity for evidentiary hearing was required. *Id.* at 9. Even at the current stage of these proceedings, PTUA notably makes no assertion that the existing rates were in fact just and reasonable. In these circumstances, we are persuaded that even if the Commission's use of the compliance filing were an improper reliance on extra-record evidence, it would not justify invalidation of the agency's action because no substantial prejudice has been shown to result. *See United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 530, 66 S.Ct. 687, 695, 90 L.Ed. 821 (1946); *Association of Massachusetts Consumers, Inc. v. SEC, supra.*

RETROACTIVITY OF THE COMMISSION'S ORDER

In addition to setting new rates under § 206, the Commission in its January 25, 1982 order made the rates effective from August 1, 1978, the date of its prior rate

determination. The Commission reasoned that

> The effect of this action would be to place all parties in the position they would have been in had the FPC in its prior orders interpreted the PTUA and ED—1 contracts as required by the court's decision. We firmly believe the Commission has the responsibility and authority to place the parties in the same position they would have been in if the FPC had ruled correctly in the first instance.

Order on Remand, 18 FERC (CCH) ¶ 61,066 at 61,110. Section 206(a) of the Federal Power Act empowers the Commission to determine and impose just and reasonable rates only after finding that existing rates are unjust, unreasonable, unduly discriminatory or preferential. In this case the Commission did not make such an explicit finding on August 1, 1978, because it believed it was properly proceeding under § 205, which requires only that the utility's newly filed rates be found just and reasonable, and not that the old ones be found unjust, unreasonable, unduly discriminatory or preferential. The Commission did not explicitly make the latter finding until its January 25, 1982 *Order on Remand*, after we had made clear that the contract would not permit a § 205 proceeding. The Commission then determined that the rates in effect before August 1, 1978 produced an unjust and unreasonable rate of return. *Id.* The final issue we must address is whether the Commission's actions in this regard were sufficient to comply with § 206(a).

The Supreme Court has told us to look to the substance of the requirements of § 206(a) rather than to its rigid formalities, *FPC v. Sierra Pacific Power Co.*, *supra*, 350 U.S. at 353, 76 S.Ct. at 371. In the circumstances of the

present case, we think the substance of a finding of unjustness and unreasonableness was adequately met on August 1, 1978. In its decision of that date, the Commission affirmed, with minor modifications not now relevant, the Initial Decision of its ALJ. *Order Affirming Initial Decision.* That decision had not only found that 9.41 percent was a just and reasonable composite rate of return on capital to be derived from the PTUA contract; but had also found that the joint proposal of Arizona Electric Power Cooperative and PTUA for a 12.25 percent rate of return on *equity* capital was outside the zone of reasonableness. *Arizona Public Service Co.*, 1 FERC (CCH) ¶ 63,045 (Dec. 19, 1977), at 65,332 (*"Initial Decision"*). Even if one assumes that a *zero* rate of return on debt capital could be reasonable (though in fact even PTUA itself suggested 7.43 percent for bonds and 7.90 percent for preferred stock, *see Initial Decision* at 65,329), at the debt-equity ratio found by the Commission (64.46 percent debt to 35.54 percent equity, *see Order Affirming Initial Decision*, 4 FERC (CCH) ¶ 61,101 at 61,211), the 12.25 percent equity figure would have yielded a composite rate of return of 4.35 percent. Thus, even allowing for a wide margin of error, the ALJ had necessarily found that a composite rate of .552 percent was outside the zone of reasonableness.

Even if we assumed that the ALJ's finding on this point was not authoritatively adopted by the Commission, we must still find that a determination of the unreasonableness of a .552 percent rate of return was effectively made in the 1978 Order. To be sure, there is, as we have noted, no single reasonable rate for any contract, but rather a zone of reasonableness, *see FPC v. Conway Corp., supra; FPC v. Natural Gas Pipeline Co., supra*, so that the

Commission's finding that 9.41 percent was just and reasonable did not amount to a finding that every other rate of return was not. But the zone of reasonableness is not endless, or else ratemaking would be a barren exercise and judicial review would be impossible. There is some point at which two rate dispositions are so far apart that they cannot possibly be embraced within the same zone. We are not normally inclined to enter into such an inquiry, but the distinctive circumstances of the present case justify it. We find as a matter of law that rates under a particular contract yielding a .552 percent rate of return and rates yielding a 9.41 percent rate of return—an 1800 percent differential—cannot both possibly fall within the zone of reasonableness. The Commission's 1978 determination that the latter were reasonable therefore amounted to a finding that the former were not.

Thus, either through reliance upon adoption of the ALJ's finding, or through our independent evaluation of the sheer expanse of the differential, we conclude that the Commission determined in 1978 that rates producing a .552 percent rate of return were unreasonable. As we now know, that amounted to a determination that the existing rates were unreasonable; even PTUA does not assert that the return from those rates was sufficiently above the .552 figure to avoid invalidation on the basis described above. The only genuine dispute is whether, in order to permit the new rates to take effect from 1978, the Commission must have *then undergone* the calculation which revealed the fact of a .552 percent rate of return. We think not. If, as the Commission has subsequently found, that was the actual rate of return; and if that rate of return was in 1978 found to be unreasonable; we believe that in the distinctive

circumstances of this case, the substantial purpose of the § 206(a) requirement has been met. We note in this regard that the 1977 ALJ and 1978 Commission opinions which approved APS's rate increase under its contract with PTUA also approved similar increases under APS's other supply contracts, some of which were from the beginning recognized by the Commission to require § 206 procedures. That portion of the opinions which, with regard to those §206 contracts, pertained to consideration and determination of the unreasonableness of existing rates, consisted *entirely* of two paragraphs in the ALJ's *Initial Decision*. First, under the heading "Ultimate Findings and Conclusions":

> (4) Applicant's rates which are the subject of a Section 206 investigation in these dockets, as noted above, are unjust and unreasonable and unlawful, and Applicant should, therefore, be required to file just and reasonable rates as necessary to conform to this decision.

Initial Decision, 1 FERC (CCH) ¶ 63,045 at 65,343. And under the heading "Order":

> Wherefore, *It is ordered*, subject to review by the Commission that: . . .
>
> (B) The existing rates referred to in paragraph (4) above are unjust and unreasonable and unlawful, and shall be changed to conform to this decision.

Id. There is no doubt in our mind that, had it been understood that the present contract was also subject to § 206, it would have been routinely included among the referenced contracts, after routine receipt of the additional factual data necessary for that purpose. One circuit has held

that when new rates are fixed under § 206 "[t]here is no validity to the contention . . . that there must be a finding or determination directed to the old schedule." *Public Service Co. of New Mexico v. FERC, supra,* 628 F.2d at 1270. We are not prepared to go that far; but neither are we prepared to "make a fetish" of the § 206 requirement, *United States v. Pierce Auto Freight Lines, Inc., supra,* 327 U.S. at 530, 66 S.Ct. at 695, by requiring a three and one-half year deferral of a justified rate increase because, although the facts are clear, not all the magic words were uttered.

We emphasize that we will not generally be drawn into the complex analysis here indulged. Whether or not the finding that a new rate is reasonable (or that a proposed new rate is unreasonable) amounts to a finding that the old one was unreasonable, it will ordinarily be an abuse of the Commission's discretion not to make the latter finding explicit; and we will ordinarily inquire no further. We have been willing to probe into the "substance [of] the requirements," *FPC v. Sierra Pacific Power Co., supra,* 350 U.S. at 353, 76 S.Ct. at 371, in the present case only because of the understandable reason for the Commission's failure to comply in form as well as in substance with the terms of the statute (*viz.,* the confusion produced by an unclear contract), and because of the Commission's subsequent explicit finding of unreasonableness which leaves no doubt that we are making a rate judgment with which the Commission fully agrees.

Petition denied.

APPENDIX D

ORDERS OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA JANUARY 12, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1983

No. 82-1338

PAPAGO TRIBAL UTILITY AUTHORITY
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

ARIZONA PUBLIC SERVICE COMPANY
Intervenor

And Consolidated Case No. 82-1339

Before: EDWARDS and SCALIA, Circuit Judges and VAN DUSEN, Senior Circuit Judge, U.S. Court of Appeals for the 3rd Circuit.

January 12, 1984

ORDER

On consideration of the Petition for Rehearing of Petitioner, filed December 27, 1983, it is

Ordered by the Court that the aforesaid Petition is denied.

Per Curiam

For The Court:

GEORGE A. FISHER, CLERK

By:
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1338

PAPAGO TRIBAL UTILITY AUTHORITY
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

Arizona Public Service Company
Intervenor

And Consolidated Case No. 82-1339

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges, and VAN DUSEN, Senior Circuit Judge, U.S. Court of Appeals for the 3rd Circuit.

January 12, 1984

ORDER

The Suggestion for Rehearing *en banc* of Petitioner, filed December 27, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

Ordered by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For The Court:

GEORGE A. FISHER, CLERK

By:
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX E
Statutes

APPENDIX E

Federal Power Act
Section 205, 16 U.S.C. § 824d.

§824d. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the

expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Federal Power Act
Section 206, 16 U.S. C. §824e.

§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

APPENDIX F
APS-PTUA CONTRACT

WHOLESALE POWER SUPPLY AGREEMENT PAPAGO TRIBAL UTILITY AUTHORITY

THIS AGREEMENT,entered into this 28th day of May, 1971, by and between ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation (hereinafter called "Company"), and THE PAPAGO TRIBAL UTILITY AUTHORITY, acting by authority granted from the Papago Council, (hereinafter called "PTUA");

WITNESSETH:

WHEREAS, the PTUA and the Papago Tribe desire to facilitate mining and industrial development on the Papago Reservation and the furnishing of electricity for such purposes and for other purposes on the Papago Reservation; and

WHEREAS, the Papago Tribe has heretofore granted certain mining rights, leases and privileges to Hecla Mining Company and Newmont Mining Company, and it is contemplated that the development of such mines and refining, smelting and related activities will be of benefit to the Papago Tribe, and the Papago Tribe desires to foster and encourage such development; and

WHEREAS, the PTUA plans to furnish electric power for such mining, milling, smelting and related operations and to distribute power elsewhere on the Reservation, and the PTUA desires to purchase its total power requirements for such purposes from the Company in an amount up to 25 MW, unless increased as provided in Section 2.2 hereof; and

WHEREAS, in order to facilitate and permit the achievement of the plans hereinabove referred to, the following Agreement is hereby entered into:

1. **Specific Facilities to be Provided.**

1.1 The delivery point for power sold to the PTUA hereunder shall be the point of division of ownership of the electric facilities of Company and the electric facilities of the PTUA, at approximately the location indicated on the plat attached hereto as Exhibit A, said power to be delivered at approximately 230 Kv, with Company to own and maintain and operate the necessary facilities on its side of the delivery point for the delivery of electricity to the PTUA at the delivery point. The PTUA will provide, at no cost to the Company, necessary right of way for any lines or substation sites necessary to deliver power to the delivery point. The PTUA will provide, maintain, and operate or cause to be provided, maintained, and operated the necessary facilities to permit it to receive electricity at the delivery point.

1.2 The parties respectively will plan and carry out the construction schedules for the aforesaid facilities with the purpose of both being ready for the commencement of electric deliveries hereunder at the delivery point on the commencement date hereinafter stated.

2. **Power Supply.**

2.1 Company will supply or make available, and PTUA will take or pay for electric power and energy in the amount of its requirements up to a maximum demand (defined hereafter) of 25 MW, unless said limit is changed as provided in Section 2.2. Electric service supplied hereunder shall be in the form of three-phase, 60-cycle electricity at a nominal voltage of approximately 230 KV.

2.2 In the event PTUA shall desire to increase the maximum demand as specified in Section 2.1, it may do so by notice given in writing two (2) years in advance of the

effective date of such increase; provided, however, tha Company shall have the right to refuse to accept such proposed increase in demand by notice given to PTUA within thirty (30) days after receipt of notice of such desire to increase the maximum demand. In the event that the PTUA should procure a source of energy to supply such amount in excess of 25 MW, whether from an outside supplier or by means of acquiring its own generating facilities, the PTUA agrees that such power and energy from such other source or its own generating facilities shall not be utilized in place of nor operated in parallel with the power and energy which the PTUA is obligated to purchase hereunder and which the Company is obligated to supply or make available.

2.3 Once a peak demand (hereinafter defined) has been established, which is higher than the maximum demand, specified in Section 2.1, whether or not inadvertent or occurring without notice or consent of Company, this shall constitute a new maximum demand for the current billing period and for all subsequent billing periods hereunder, unless and until increased pursuant to the terms and conditions of this contract, subject to the right of Company to have the maximum demand in effect prior to such peak demand remain in effect unaffected by the existence of such peak, and, in addition PTUA shall reimburse Company for any expenses or damages incurred by Company, as a result, of the occurrence of such peak demand.

2.4. PTUA will exercise due diligence to assure that the electrical characteristics of its load, such as deviation from sine wave form or unusual short interval fluctuations in demand, shall not be such as to result in impairment of service to other customers or in interference with operation of telephone, television or other communication facilities. The deviation from phase balance will not be greater than

ten (10) per cent of the demand at all times. Each party shall supply the reactive power requirements for its own system and there shall be no transfer or flow of reactive Kilovolt-amperes at points of interconnection hereunder except when transfer of reactive Kilovolt-amperes may be agreed upon from time to time by authorized representatives of the contracting parties.

2.5. **Use on Reservation Only.** Electric power and energy to be supplied by Company to PTUA hereunder shall be solely for consumption and use within the Papago Reservation.

3. **Rates for Power Supply.**

3.1. The rates applicable during the initial one (1) year period hereof and thereafter unless and until changed as hereinafter provided in Section 3.6 hereof, for power and energy delivered to PTUA hereunder, will be computed in accordance with the following rate provisions, subject to changes from time to time as hereinafter provided:

(a) **Base Monthly Rate:**

(i) Local Facilities Charge:

1.55% of local investment (as hereinbelow defined), plus

(ii) Demand Charge:

$2.915 per KW of billing demand, plus

(iii) Energy Charge:

$0.0024 per Kwh

(b) **Base Monthly Minimum:**

(i) Local Facilities Charge, plus

(ii) Demand Charge

(c) **Monthly Adjustments:**

(i) The demand and local facilities charge of the monthly rate shall be adjusted up or down each month by adding or subtracting an amount as provided in Section 3.3.

(ii) The energy charge shall be subject to adjustments based on the cost to Company's electric operations for any changes in the prices of fuel consumed in electric generating plants owned by or supplying energy to the Company from prices in effect March 1, 1962, for then existing plants, or on the dates of initial commercial operation for subsequent and future plants as more specifically detailed in the amended Plan for Administration of Adjustment for Cost of Fuel filed from time to time with the Federal Power Commission.

(iii) The total monthly bill shall be subject to the applicable proportionate part of any taxes or governmental impositions which are or may in the future be assessed on the basis of gross revenue of Company and/or the price of revenue from the electric energy or service sold and/or the volume of energy generated or purchased for sale and/or sold hereunder.

(d) **Monthly Billing Demand:**

The monthly billing demand will be the higher of the following:

(i) The highest 30 minute integrated demand (KW) measured during the 24 months ended with the billing month, or

(ii) The contract demand (hereinafter defined).

3.2 The quantities of power and energy delivered shall consist of the amount of electricity delivered as determined from the monthly meter readings at the delivery point.

3.3 The monthly adjustments to be added to or subtracted from the Local Facilities Charge and the Demand Charge in accordance with Paragraph 3.1 (c) (i) are intended to reflect the effect on Company's cost of service of changes in applicable (a) ad valorem tax rates and/or assessment ratios, (b) Federal and State income tax rates, (c) prices for materials and supplies, and (d) labor rates. These monthly adjustments will be computed in accordance with Exhibit B attached hereto and made a part hereof.

3.4 Reduction in Maximum Demand and Payment for Unused Capacity.

In the event that Hecla Mining Company and/or Newmont Mining Company shall exercise rights under their respective power purchase contracts with PTUA so as to cancel their respective purchase obligations under either or both such contracts effective at any time after ten (10) years from the effective date of this Agreement, PTUA shall have the right, by written notice, given within three (3) months after notice by Hecla or Newmont, as to exercise of such cancellation right, to effect a reduction hereunder

equivalent in amount to the amount cancelled under such purchase contract or contracts, provided that in such event, PTUA shall forthwith pay the Company for unused power production and integrated transmission system capacity according to the following terms and conditions:

A. The previously established maximum demand KW will be reduced by the amount specified in the notice given by PTUA to establish a new maximum demand KW. Thereafter the maximum demand KW will be determined according to the provisions of Section 2 hereof.

B. Payment for unused production and integrated transmission system capacity:

1. PTUA shall pay the Company for unused production and integrated transmission system capacity as follows:

a. In the event PTUA gives the Company seven (7) years notice there shall be no charge.

b. In the event PTUA gives the Company less than seven (7) years notice, PTUA shall pay the Company for unused power production and integrated transmission system capacity as computed by the following formula:

$$A = 9dk(7-n)$$

where:

A = dollar amount of payment

d = dollars per KW of Demand Charge specified in Section 3.1(a)

$k = K_1 - K_2$.

where:

K_1 = maximum demand KW established in Section 2.

K_2 = new maximum demand KW established under Paragraph A.

n = number of years notice given, not to be more than six (6) years or less than two (2) years.

C. Notice must be given not less than two (2) years prior to the date of the requested reduction in maximum demand. Such notice must be in writing and sent by registered mail to the Company's general offices in Phoenix, Arizona.

D. Billing under this Section is to be on or after the effective date of the reduction in maximum demand, and payment shall be due fifteen (15) days after date of billing. Amounts not paid on or before the due date shall be payable with interest accrued at a monthly rate of 1.0% compounded monthly from the due date to the date of payment.

3.5. **Definitions.**

"Local Investment" - the cost to Company of the facilities and related metering equipment installed to deliver energy from the Company's integrated transmission system to the respective delivery points hereunder.

"Company's Integrated Transmission System" - the present or future integrated transmission system of Company, consisting of circuits of 230 KV or higher, which interconnect the Company's generating stations.

"Peak Demand" - the highest 30 minute integrated demand measured at the delivery point during any month.

"Maximum Demand" - the maximum demand is the maximum number of Kilowatts that PTUA is entitled to receive and the maximum number of Kilowatts that Company is obligated to furnish.

"Contract Demand" - the contract demand is equal to the peak demand until December 31, 1975, or until it reaches 2/3 of the maximum demand thereafter the contract demand is equal to 2/3 of the maximum demand specified in Section 2.1, or modified as provided in Section 2.2 and Section 2.3.

3.6. The rates hereinabove set out in this Section 3 and Exhibits thereto are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party.

4. **Billing and Payment.**

4.1. Company will endeavor to render bills to PTUA on or before the 15th day of each calendar month for services furnished during the preceding billing month. In such bills, Company may designate certain items as being on an estimated basis due to unavailability of final underlying data, in which event adjustments to the correct amounts, when correct amounts are determined, shall be included in a bill for a subsequent month. Billing month for purposes hereof shall be a calendar month.

4.2. Payment by PTUA to Company shall be due on the 25th day of the calendar month following the billing month,

or on the 10th day after mailing of bill, whichever day be later. Amounts not paid on or before the due date shall be payable with interest accrued at the rate of 1% a month compounded monthly from the due date to the date of payment.

Payment to the account of the Company shall be effected by or on behalf of the PTUA at the Downtown office of the First National Bank of Arizona, in Tucson, Arizona. The PTUA agrees, in consideration of the Company's entering into this agreement, that it will irrevocably, during the term of this agreement, direct the Hecla Mining Company and the Newmont Mining Company, their successors and assigns, to which the PTUA expects to resell a substantial amount of the power and energy purchased by it from the Company hereunder, that payments due to the PTUA for sales of electric power and energy by the PTUA to said mining corporations be paid to the said Downtown office of the said bank, for the account of the PTUA, and further that the PTUA agrees to irrevocably direct the said Bank to make monthly payments to the Company out of the amounts so paid to the account of the PTUA at said Bank by the mining corporations, the amount of payment to be made to the Company to be that shown to be due on the bills to be submitted by the Company to said Bank each month. This agreement is contingent upon an instrument setting out in full the terms and conditions relating to the said payments by the mining corporations to the said Bank and the payment by the said Bank to the Company, signed on behalf of the Bank, the mining corporations, the PTUA and the Company, and approved by the Tribal Council, such instrument shall be in accordance with the terms and procedures set forth in Exhibit C attached hereto and made a part hereof.

4.3. In case a portion of any bill be in dispute, the PTUA shall notify the payment bank of such fact and of the amount in dispute, and only the undisputed amount shall be paid to the Company when due, and the remainder, if any, shall be held by the Bank and, upon determination of the correct amount, shall be paid promptly after such determination, with interest accrued as aforesaid from the original due date.

4.4. If failure by PTUA to pay any amount due, and not in bona fide dispute, shall continue for thirty (30) days after demand of Company for payment, Company shall have the right to suspend power delivery hereunder until all amounts due have been paid. Such suspension shall not relieve PTUA of any amounts previously due or of any minimum bills due in the future, nor shall such suspension invalidate any other agreements with the PTUA.

5. **Measurement of Power.**

5.1. Company will own and maintain the metering equipment for measuring the flow of power and energy delivered hereunder at the point of delivery.

5.2. Company will at its own expense make such periodic tests, at least once each year, and inspection of its meters as may be necessary to maintain a commercial standard of accuracy, will restore to a condition of accuracy any meters found to be inadequate, and will advise PTUA promptly of the results of any such test which show any inaccuracy more than 2% slow or fast. PTUA shall be given notice of, and may have representatives present at, such tests and inspections. Company will make additional tests of its meters at the request of PTUA and in the presence of PTUA's representatives. If any such periodic or additional

tests show that a meter is inaccurate by more than 2% slow or fast, correction shall be made in the billing to the PTUA for the previous billing month, or from the date of the latest test if within the previous billing month, and correction shall be made in meter records for the elapsed period in the month during which the test was made. The cost of any additional test requested by PTUA shall be borne by PTUA if such test shows a meter accurate within 2% slow or fast, and by Company if such test shows a meter inaccurate by more than 2% slow or fast. If at any time a meter should fail to register or its registration should be so erratic as to be meaningless, the estimated correct registration for billing purposes shall be based on records of check meters, if available, or otherwise upon the best obtainable data.

5.3. Representatives of PTUA shall be afforded opportunity to be present at monthly readings of kilowatt-hour meters involved in settlements hereunder, and to examine records of demand meters.

6. **Arbitration.**

6.1. **Reference to Arbitration.** In the event the parties should be unable to reach agreement with respect to any matter arising under or in connection with this agreement, either party may call for submission of such matter to arbitration in the manner herein set forth. The party calling for arbitration shall give notice to the other party, setting forth in such notice the issues to be arbitrated, and within ten (10) days from receipt of such notice, the other party may give notice to the first party setting forth additional related issues to be arbitrated.

6.2. **Appointment of Arbitrators.** Within fifteen (15) days from its notice calling for the arbitration, the first party shall appoint a person to serve as one arbitrator with notice to the other party of such appointment, and, within fifteen

(15) days after receipt of notice of appointment of the first arbitrator, the other party shall appoint a person to serve as a second arbitrator with notice to the first party of such appointment. The two persons so appointed shall then agree upon and secure a third arbitrator. If the third arbitrator should not be secured within fifteen (15) days from the appointment of the second arbitrator, or if the second arbitrator should not be appointed within fifteen (15) days from the appointment of the first, either party, with notice to the other party, may request the Secretary of the Interior to appoint the third arbitrator, or the second and third arbitrators, as the case may be. In case the Secretary should decline to act upon such request or for twenty (20) days should fail to act, then either party, with notice to the other party, may call upon American Arbitration Association for such appointment or appointments.

6.3. **Arbitration Procedure.** The arbitrators so appointed shall hear the evidence submitted by the respective parties and may call for additional information, which additional information the party called upon shall furnish to the extent feasible. A determination signed by a majority of the arbitrators shall be conclusive with respected to the issue submitted and shall be binding upon both parties.

6.4. **Expenses of Arbitration.** Each party shall bear the fee and personal expenses of the arbitrator appointed by it or for it, together with the fees and expenses of its counsel and its own witnesses, and all other costs and expenses of the arbitration shall be borne in equal parts by the parties, unless the decision of the arbitrators shall specify a different apportionment of any or all of such costs and expenses.

7. **Special Provisions.**

7.1. In order to induce Company to enter into this Wholesale Power Supply Agreement between the Company

and the PTUA, and the Construction Agreement, and the Operating and Maintenance Agreement, dated concurrently herewith, providing for the construction and maintenance by it on behalf of the PTUA, of facilities located on the Papago Reservation for transmission of electricity from the delivery point under the Wholesale Power Supply Agreement to the point at which the electricity is delivered by the PTUA to the Hecla Mine and the Newmont Mine, the PTUA and the Papago Tribe hereby covenant as follows:

7.2. The Tribe will not tax, assess or regulate in any manner whatsoever the property of the Company located on the Reservation or the Company's activities under this Wholesale Power Supply Agreement or the Operating and Maintenance Agreement, or the Construction Agreement, or the transmission facilities on or off the Reservation, or the transmission, sale or disposition of power at such delivery point or over such facilities, or any activities entered into thereunder or any operating, maintenance or replacement work done in connection therewith.

7.3. The PTUA and the Papago Tribe hereby agree, that in the event of a dispute arising hereunder not settled by arbitration, such dispute shall be submitted to the jurisdiction of the Courts of the State of Arizona or Federal Courts.

7.5. **Separability.** In the event that any of the terms or conditions of this Agreement, or the application of any term or condition to any person or circumstance, shall be held invalid by any Court having jurisdiction in the premises, the remainder of this Agreement, and the application of such terms and conditions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

8. **General Provisions.**

8.1. **Uncontrollable Forces.** Company shall not be held responsible or liable for any loss or damage to PTUA on account of non-delivery of power hereunder occasioned by uncontrollable forces, the term "uncontrollable forces" meaning for purposes hereof, causes beyond Company's control, including, but not limited to, failure of facilities, flood, earthquake, storm, lightning, fire, explosion, epidemic, war, riot, civil disturbance, labor stoppage, sabotage, or restraint by court or public authority, which by exercise of due diligence it shall be unable to overcome. Company will, however, exert every practicable effort to assure continuing of power supply to PTUA. Nothing herein shall be construed to obligate Company to forestall or settle a strike against its will.

8.2. **Responsibility as to Use of Service or Apparatus.** Company and PTUA each assume all responsibility on their respective sides of the points of delivery for the electric service supplied to PTUA hereunder, as well as for any apparatus used in connection with such supply. Company and PTUA each will save the other harmless from and against all claims for injury or damage to persons or property on their respective sides of the points of delivery, occasioned by or in any way resulting from the electric service supplied hereunder or the use thereof.

8.3. **Waivers.** A waiver at any time by a party of its rights with respect to default, or with respect to any other matter arising in connection with this agreement, shall not be deemed a waiver with respect to any subsequent default or matter.

8.4. **Notices.** All formal notices, demands or requests given or made under this agreement shall be in writing and shall be deemed properly given or made if delivered personally or sent by registered mail, certified mail or telegram to the person designated below:

Notices to Company:

Secretary of the Company
Arizona Public Service Company
501 South Third Avenue
Phoenix, Arizona

Notices to the PTUA:

Chairman of the Papago Tribal Utility Authority
Papago Tribal Utility Authority
500 Transamerica Building
Tucson, Arizona

9. **Term.**

9.1. **Effective Date.** Company and PTUA will endeavor to have the necessary facilities for delivery and receipt of service hereunder ready for commercial operation by April 15, 1972. In the event the Company has constructed the facilities necessary to enable it to render service hereunder, payment by the PTUA to the Company pursuant to the rates hereinabove set out shall commence on April 15, 1972, or, if the approvals referred to in Section 10 have not been procured by that date, as soon thereafter as such approvals have been received, whether or not the PTUA is ready to receive service, regardless of the reason therefor. In no event, however, shall this agreement become effective unless and until the mines have duly executed guarantees of the performance and payment of this contract by PTUA.

9.2 **Duration.** This agreement shall run for an initial period of thirty (30) years from April 15, 1972.

9.3. **Extension of Term.** This agreement shall automatically continue for successive periods of ten (10) years each beyond the initial period, unless and until cancelled by either party as of the expiration date of the initial period, or of any extension period, by notice given not less than five (5) years in advance of the intended termination date.

10. **Approvals.** It is understood that to become effective (i) the aforesaid power supply agreement shall have been executed and approved, and (ii) this agreement shall have been approved by the Papago Tribal Council and the Council Resolution approving this agreement shall have been approved by the Superintendent and reviewed by the Secretary of the Interior. In addition, to the extent that the Federal Power Commission may have jurisdiction pursuant to the Federal Power Act, this agreement is subject to that Commission and to the procuring by Company of any requisite authorization or acceptance for filing as a rate schedule or other action by that Commission.

11. **Guarantee by Mines.** This agreement is contingent upon Hecla Mining Company and/or Newmont Mining Company each having furnished to the Company a guarantee of payment by the PTUA, in form and substance satisfactory to the Company, with due authorization of their respective Boards of Directors.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above set out.

ARIZONA PUBLIC SERVICE COMPANY

By: /s/ Keith L. Turley

Its Executive Vice President

THE PAPAGO TRIBAL UTILITY AUTHORITY

By /s/ Arnold F.Smith

Its Vice Chairman

ATTESTED:

/s/

Secretary

ATTESTED:

/s/

Secretary

APPROVED pursuant to RESOLUTION NO. 18-71 of The Papago Council

THE PAPAGO TRIBE

/s/ _____

Augustine B. Lopez
Chairman
The Papago Council

ATTEST:

/s/ _____

Secretary

DATE: 6/29/71

EXHIBIT A
[map not reproduced]

WHOLESALE POWER SUPPLY AGREEMENT

PAPAGO TRIBAL UTILITY AUTHORITY

EXHIBIT B

Base Monthly Rate Local Facilities Charge and Demand Charge Adjustment Formulae

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A. Monthly Local Facilities Charge Adjustment

(i) The adjustment for changes in income tax rates shall equal

0.26% × local investment multiplied by

$$\left[\left(\frac{100 - 50.109}{50.109} \times \frac{T}{100 - T}\right) - 1\right]$$

where:

T = the composite federal and state income tax rate in per cent that is applicable to APS' taxable income during the billing month.

(ii) The adjustment for changes in ad valorem tax rates and/or assessment ratio shall equal

0.24% × local investment multiplied by

$$\left[\frac{T \times R}{0.02827} - 1\right]$$

where:

T = the tax rate for the applicable school districts (including state, county and local rates) for the

calendar year that includes the current billing month.

R = the assessment ratio applicable to APS on its operating properties during the billing month.

(iii) The adjustment for changes in the price of materials and supplies and labor rates shall equal

0.12% × local investment multiplied by

$$\left[\frac{0.442A}{115.1} + \frac{0.558B}{5.59} - 1\right]$$

where:

A = the U.S. Bureau of Labor Statistics Wholesale Price Index for the calendar month preceding the billing month.

B = the average hourly earnings for utility employees in Arizona for the calendar month preceding the billing month as computed and published by the Arizona Employment Security Commission Unemployment Compensation Division.

B. Monthly Billing Demand Adjustment

(i) The adjustment for changes in income tax rates shall equal

$$0.5285 \left[\left(\frac{100 - 50.109}{50.109} \times \frac{T}{100 - T}\right) - 1\right] \quad \$/Kw$$

where:

T = the composite federal and state income tax rate in per cent that is applicable to APS' taxable income during the billing month.

(ii) The adjustment for changes in ad valorem tax rates and/or assessment ratio shall equal

$$0.3387 \left[\left(\frac{T \quad R \quad B}{0.01537}\right) - 1\right] \quad \$/Kw$$

where:

T = the weighted average tax rate for the calendar year that includes the current billing month for all Arizona ad valorem taxes as computed and published annually by the Arizona State Tax Commission.

R = the assessment ratio applicable to APS on its operating properties during the billing month.

(iii) The adjustment for changes in the price of materials and supplies and labor rates shall equal

$$0.5850 \left[\frac{0.5A}{115.1} + \frac{0.5B}{3.59} - 1\right] \quad \$/Kw$$

where:

A = the U.S. Bureau of Labor Statistics Wholesale Pric Index for the calendar month preceding the billing month.

B = The average hourly earnings for utility employees in Arizona for the calendar month preceding the billing month as computed and published by the Arizona Employment Security Commission Unemployment Compensation Division.

C. Corrections of Formulae

In the event of changes in tax laws, allowable income tax depreciation rates, methods of computing taxes or changes in any other circumstances which cause the above formulae to become inapplicable or to produce improper results, the parties will compute and agree on new formulae which will properly reflect the intent of such formulae. If the price and labor indexes specified above become unavailable or have their bases changed, the parties will agree on new indexes and/or proper adjustments to the formulae to reflect such changes.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 1984, three copies of this Appendix to Petition for a Writ of Certiorari were mailed, postage prepaid, to all counsel of record for the parties below.

_____

Arnold D. Berkeley

No. 83-1652

In the Supreme Court of the United States

OCTOBER TERM, 1983

PAPAGO TRIBAL UTILITY AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that under the terms of a particular contract between a utility and its customer, allowing rate increases to take effect after proceedings before the Federal Energy Regulatory Commission pursuant to Section 206 of the Federal Power Act, the utility was entitled to increase its rates upon a finding by the Commission that the existing rate was unjust and unreasonable.

2. Whether, in the particular circumstances of this case, the Commission's order setting the effective date of the utility's rate increase was consistent with the "filed rate doctrine."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Statute:

Miscellaneous:

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-41) is reported at 723 F.2d 950. An earlier, related opinion is reported at 610 F.2d 914. The order of the Federal Energy Regulatory Commission on remand (Pet. App. 4-21) is reported at 18 F.E.R.C. para. 61,066 (1982).

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1983. A petition for rehearing was denied on January 12, 1984 (Pet. App. 43-44). The petition for a writ of certiorari was filed on April 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, are set forth at Pet. App. 46-49.

STATEMENT

1. Under the Federal Power Act, 16 U.S.C. 824 *et seq.*, the Federal Energy Regulatory Commission has jurisdiction over wholesale sales of electricity in interstate commerce. Section 205(a) of the Act, 16 U.S.C. 824d(a), declares that all rates and charges for such sales "shall be just and reasonable."

Before a utility may increase its rates, it must file with the Commission a new schedule setting forth the changes to be made in its existing rates. Section 205(e) of the Act, 16 U.S.C. 824d(e), provides that, upon such a filing, the Commission may order a hearing on the lawfulness of the new rates and may suspend them for up to five months, after which they may be collected, subject to refund (with interest) of any portion of the increased rates that the Commission finds is not justified.

Section 206(a) of the Power Act, 16 U.S.C. 824e(a), empowers the Commission to examine existing rates and to establish new ones where it finds, after a hearing, that any rate is "unjust [or] unreasonable." Rate adjustments under Section 206(a) are prospective only, with no power in the Commission to order refunds.

Although Section 205 of the Act seemingly permits utilities to file for rate increases unilaterally and to begin collecting new rates after the statutory notice period and at most a five month suspension, this Court has recognized that a utility may, by contract, waive its right to file for a rate increase. *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Moreover, the Court has specifically held that where a utility enters into such a contract, the Commission may not declare the contractually established rate "unjust" or "unreasonable" under Section 206(a) of the Act "simply because it is unprofitable to the public utility." *Sierra*

Pacific, 350 U.S. at 355. Rather, "[i]n such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest — as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Ibid.*

2. The Papago Tribal Utility Authority (Papago) and the Arizona Public Service Company (APS) are parties to a 1971 contract (Pet. App. 51-72) which called for fixed rates for one year. At the expiration of the first year, the rates were subject to change by the Commission, with "either party * * * free unilaterally" to seek rate changes from the Commission (*id.* at 59).

In 1976, APS filed a proposed rate increase with the Commission. The Commission interpreted the relevant provision of the Papago-APS contract as allowing APS to file for and collect rate increases as provided by Section 205 of the Power Act. Accordingly, the Commission suspended the APS rate increase and permitted the utility to collect the new rates pending the conclusion of administrative proceedings on their propriety.

The court of appeals reversed. *Papago Tribal Utility Authority* v. *FERC (Papago I)*, 610 F.2d 914 (D.C. Cir. 1979). The court held that the contract language, providing that the contract rates would "remain in effect * * * until changed by the * * * Commission," meant that APS could collect its new rates only after a Commission proceeding and that the Commission must conduct the proceeding under Section 206 of the Act, 16 U.S.C. 824e, the provision relating to Commission-imposed rate changes. Thus, APS could not collect the new rates on an interim basis subject to refund.

3. On August 1, 1978, while *Papago I* was pending in the court of appeals, the Commission completed its administrative proceedings and authorized a new rate for the utility. 4 F.E.R.C. para. 61,101. Following the court of appeals' decision in *Papago I*, the Commission had the task of reconsidering this final rate order, which had been issued under the assumption that the Papago-APS contract permitted unilateral rate increases under Section 205 of the Act. Thus, in the proceedings on remand the Commission had to decide the proper standard for permitting a rate increase under the Papago-APS contract — the "unjust and unreasonable" standard of Section 206, or the *Sierra* "public interest" standard. In addition, the Commission had to determine the effective date of the new rates.

In its order on remand, the Commission held that the *Sierra* "public interest" standard applied only to fixed rate contracts, wherein a utility foregoes the right to seek a rate increase under either Section 205 or Section 206 (Pet. App. 7). Because the contract at issue was not a fixed rate contract for the period after 1972, the Commission concluded that the *Sierra* "public interest" standard was inapplicable here (*id.* at 8-9). Instead, the Commission held that the applicable standard was that of Section 206, under which the utility's existing rates must be found by the Commission to be "unjust" or "unreasonable" before new just and reasonable rates can be approved (Pet. App. 10). Based on the cost calculations adduced in its 1978 order, the Commission concluded that the utility's prior rates were "unjust and unreasonable" under Section 206; the Commission also concluded that the proper effective date for the new rate was the date of its 1978 order (Pet. App. 10-11). The Commission found that this "place[d] all parties in the same position they would have been in if the [Commission] had ruled correctly in the first instance" (*id.* at 10).

4. The court of appeals affirmed (Pet. App. 25-41). Based on its review of the terms of the Papago-APS contract, the court held that, after an initial one-year term, the contract permitted rate changes that are just and reasonable following Commission proceedings under Section 206 of the Power Act (Pet. App. 31-34). In addition, the court upheld the Commission's determination that the rate increase should take effect as of the date of the Commission's 1978 order (Pet. App. 36-41). In so doing, the court concluded that, in the particular circumstances of this case, the Commission's 1978 order approving the utility's new rate as just and reasonable was in substance a finding that the utility's prior rate was unjust and unreasonable.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this or any other court, and does not warrant review. Petitioner raises two contentions, neither of which has merit. First, petitioner argues that the Commission applied the wrong standard in permitting APS to effect a rate increase; in petitioner's view, the Commission should have applied the more stringent "public interest" standard of *Sierra* rather than the standard of Section 206 of the FPA, which authorizes the Commission to set new rates upon a finding that existing rates are unjust and unreasonable. Petitioner also challenges the Commission's decision to make the increase effective as of the date of its 1978 rate order in this case.

1. Contrary to petitioner's contention (Pet. 9-11), no court has ever held that a contract between a utility and its customers, providing for rate changes after proceedings under Section 206, must be construed as barring any change in rates unless the Commission makes a finding that the existing rates are contrary to the public interest. Indeed, as this Court recognized in *Sierra* (350 U.S. at 355), the parties

are free, under the Power Act, to agree upon the standard governing rate changes.[1] Thus, the question in this case is simply one of construing the APS-Papago contract at issue here.

In its decision below, the court of appeals identified three general categories of contractual arrangements: (1) contracts allowing unilateral rate increases under Section 205 with an increase permitted if the new rates are just and reasonable; (2) fixed rate contracts, as in *Mobile* and *Sierra*, wherein the utility surrenders its right to file for rate increases but the Commission nonetheless may permit an increase if the contract rates are contrary to the public interest; and (3) contracts permitting the utility to file for rate increases but providing that the company may collect them only after a Section 206 proceeding in which the Commission finds that existing rates are unjust and unreasonable (Pet. App. 28-29). The court then turned to the language of the instant contract between APS and Papago.

The relevant portion of the contract (Pet. App. 59) provides for a fixed rate for one year and "thereafter unless and until changed by the * * * Commission * * *, with either party hereto to be free unilaterally to take appropriate action before the Federal [Energy Regulatory] Commission * * * in connection with changes which may be desired by such party." As the court of appeals correctly observed (Pet. App. 31-32), the provision distinguishes between the first year—when a fixed rate is in effect, and "thereafter" —when either party may apply to the Commission to change the rate. Because, under *Mobile* and *Sierra*, a utility

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[1]Of course, as the court of appeals noted (Pet. App. 31), "[t]he Commission's obligation to insure that rates do not violate [the public interest standard] is imposed for the direct benefit of the public at large rather than (like the prescription of just and reasonable rates) for the direct benefit of the seller and purchaser; and it therefore cannot be waived or eliminated by agreement of the latter."

is free at any time to request the Commission to modify even a fixed rate contract if the existing charge is found not to be in the "public interest," the APS-Papago agreement necessarily contemplated that after the first year there would be a less restrictive scheme under which the Commission, on request, could increase an unjust and unreasonable rate.

Petitioner does not refute this analysis. Instead, petitioner claims (Pet. 12-13) that at the time it entered into the contract in this case, neither the Commission nor the courts had specifically held that a contract calling for rate changes following Section 206 procedings permitted increases on a finding that the existing rates were unjust and unreasonable. Therefore, petitioner asserts, the parties must have contemplated that the "public interest" standard would govern here. This contention is erroneous and, in any event, does not present an issue of general importance warranting this Court's review.

The contract itself contains no indication that rate changes would be allowed only if the existing rates have been found by the Commission to be contrary to the public interest. At most, "[i]t is quite probable * * * that the parties * * * not only had in mind no specific answer to the question here at issue, but did not even understand that the question could be asked." *Kansas Cities* v. *FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983). In reaching the conclusion that clauses such as the one at issue permit changes in unjust and unreasonable rates, the Commission simply engaged in the common practice of construing a contract in order to fill "contractual gaps." See 3 *Corbin on Contracts* § 534, at 11-12 (1960). Moreover, as the court of appeals noted (Pet. App. 32), if the contract were construed as permitting increases only where the rates fall below the "public interest" level, the clause permitting changes after the initial year would be rendered "virtually meaningless * * * [because]

interest standard is practically insurmountable; the Commision itself is unaware of any case granting relief under it." Accordingly, the court below properly deferred to the Commission's determination on the "ultimate question of the meaning of the contract" (Pet. App. 34).

2. Petitioner also contends that the Commission's decision setting the effective date of the new rates as of its initial 1978 rate order violates the "filed rate doctrine." This contention proceeds from a faulty premise to an erroneous conclusion.

As originally enunciated by this Court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and as reaffirmed in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), the filed rate doctrine prohibits a utility from collecting new rates that have not been filed with the Commission, even where the existing filed rates are unreasonably low. In this case, the utility filed the rates at issue with the Commission in 1976. It is true that the court of appeals in *Papago I* construed the APS-Papago contract as requiring that before APS could collect those rates, the Commission first had to issue a final order under Section 206. As the court of appeals concluded in the instant decision (Pet. App. 37-40), however, the Commission in its 1978 order in effect found the existing rates unjust and unreasonable, thus satisfying both the "substantial purpose" of the Section 206(a) requirement (Pet. App. 40) and the contractual condition incorporating that requirement.[2]

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[2]The court of appeals pointed out (Pet. App. 40) that in the same proceedings in which the Commission approved APS's rate increase under its contract with Papago, the Commission also approved similar rate increases under APS's other supply contracts, some of which the Commission recognized from the beginning as requiring Section 206 procedures. In approving those rate increases the Commission expressly stated that the existing rates were unjust and unreasonable. The court of

Petitioner's claim (Pet. 14) that the decision in *Papago I* nullified the 1976 filing is wide of the mark. Although the court of appeals in *Papago I* differed with the Commission as to the legal consequences of the 1976 filing, the court did not question the lawfulness of the filing under the contract. Indeed, the APS-Papago agreement specifically permitted APS to petition the Commission for a rate increase. The court in *Papago I* did nothing more than remand the case to the Commission for further proceedings under Section 206. Thus, there is no merit to petitioner's claim that the only valid rates in effect following *Papago I* were the fixed rates in the contract. Cf. *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131 (1982).[3]

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appeals expressed "no doubt * * * that, had it been understood that the present contract was also subject to § 206, it would have been routinely included among the referenced contracts" (Pet. App. 40). The court therefore concluded that it was not "prepared to 'make a fetish' of the § 206 requirement * * * by requiring a three and one-half year deferral of a justified rate increase because, although the facts are clear, not all the magic words were uttered" (Pet. App. 41).

[3]Petitioner's reliance (Pet. 15) on *Southern Union Gas Co.* v. *FERC*, 725 F.2d 99 (10th Cir. 1984), is entirely misplaced. In *Southern Union Gas*, unlike in this case, the court held that the rate sought to be changed was not found anywhere in the utility's FERC rate schedule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

DOJ-1984-05

No. 83-1652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND ARIZONA PUBLIC SERVICE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 10, 1984

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Federal Energy Regulatory Commission's determination that the contract for the sale of electricity involved in this case contemplated changes in rates under the "just and reasonable" standard of Section 206 of the Federal Power Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

No. 83-1652

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Arizona Public Service Company (APS),[1] an intervenor in support of respondent Federal Energy Regulatory Commission (Commission) below, submits this brief in opposition to the petition for a writ of certiorari.

[1] The list of parties supplied by petitioner is correct. In accordance with Rule 28.1 of this Court, a complete listing of all parent companies, subsidiaries, and affiliates of respondent Arizona Public Service Company follows: APS Finance Company, N. V.; APS Foundation, Inc.; APS Fuels Company; Bixco, Incorporated; El Dorado Investment Company; Energy Development Company; Malapi Resources Company; and Phoenix Plaza Properties, Inc.

OPINIONS BELOW

An adequate reference to the opinion delivered by the court of appeals below and by the Federal Energy Regulatory Commission is made in the petition. The opinion of the court below is reported in *Papago Tribal Utility Authority* v. *FERC*, 723 F.2d 950 (D.C. Cir. 1983), *reh. denied*, Jan. 12, 1984.

JURISDICTION

The petition correctly states the grounds on which the jurisdiction of this Court rests.

STATUTE INVOLVED

In addition to the provisions cited by petitioner, Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), is involved in this case. That section provides, in pertinent part, that, upon review by a court of appeals,

> [t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

The full text of Section 313(b) of the Act is set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner seeks review of an opinion of the Court of Appeals for the District of Columbia Circuit affirming a decision by the Federal Energy Regulatory Commission approving a wholesale rate increase sought by APS from its wholesale customers. One of those customers is the Papago Tribal Utility Authority (PTUA), petitioner in this case. The Commission found in the order on appeal here that the proposed increase was just and reasonable, that the existing rates being collected from PTUA were

so low as to be unjust and unreasonable, and that the contract contemplated an adjustment in wholesale rates upon the making of such a finding.

This proceeding was instituted on February 26, 1976, when APS filed an application for a rate increase with the Federal Power Commission, predecessor to the present agency. The amount of the increase was approximately $4.5 million annually. The Commission accepted the new rates for filing, suspended their operation for 30 days, and set the matter for hearing. In its suspension order, the Commission held, over the objection of PTUA, that PTUA's contract with APS authorized the unilateral filing of proposed changes in rates by APS pursuant to Section 205 of the Federal Power Act, 16 U.S.C. § 824d. It rejected PTUA's contention that the rates could only be changed pursuant to Section 206 of the Act, 16 U.S.C. § 824e, which authorizes the Commission to prescribe rates to be thereafter observed if it finds the existing rates to be unjust and unreasonable.

PTUA appealed that ruling to the Court of Appeals for the District of Columbia Circuit, which held that PTUA's contract did not authorize rate filings under Section 205 of the Act. The appellate court remanded the matter to the Commission for a determination of the appropriate standard of proof to be applied in seeking a rate change under Section 206. *Papago Tribal Utility Authority* v. *FERC*, 610 F.2d 914, 930 n.127 (1979) *(Papago I)*.

While PTUA's appeal was pending before the court, the Commission proceeded under its original hearing order and ultimately approved APS' proposed rates as just and reasonable, subject to several minor adjustments. *Arizona Public Service Company*, 4 FERC (CCH) ¶ 61,101 (Aug. 1, 1978). Upon consideration of the

D.C. Circuit's remand of *Papago I*, the Commission concluded that PTUA's contract with APS only authorized rate changes pursuant to the just and reasonable standard of Section 206 of the Act. The Commission held that APS' contract with PTUA was not a fixed rate contract, but rather allowed APS to file for increased rates at the Commission with any increase to apply prospectively only upon a showing that the present rates were unjust and unreasonable. The Commission rejected PTUA's request that another hearing on this matter be held, on the ground that it would be duplicative and wasteful of the Commission's and the parties' resources, since the underlying test period data had already been examined at the first hearing. The Commission explicitly found that APS' pre-existing rates were unjust and unreasonable, inasmuch as they would allow APS to earn a rate of return of only .522 percent, and made the new just and reasonable rates effective August 1, 1978, the date of the previous rate determination, so as to put the parties in the same position they would have been in if the Commission had correctly interpreted the PTUA contract in the first place. *Arizona Public Service Company*, 18 FERC (CCH) ¶ 61,066 (Jan. 25, 1982).

PTUA again appealed the Commission's decision to the court of appeals. Disputing the Commission's interpretation of the contract, PTUA argued that the contract provided a fixed rate subject only to modification where the rate could be found to be so low as to affect adversely the public interest. PTUA also argued that the Commission erred in making the new just and reasonable rate effective on August 1, 1978, the date of the Commission's order establishing the new rates. PTUA urged that another evidentiary hearing should have been held, with the new rate being applied prospectively only from the date of the Commission's order following that hearing.

The court of appeals affirmed the Commission's order in its entirety. The court reviewed the statutory basis for changing rates under the Federal Power Act, Sections 205 and 206. The court noted that there are essentially three arrangements by which parties can agree to rate revisions. *First*, the parties may agree that a utility may unilaterally file rate changes under Section 205 of the Act, subject to the Commission's power to suspend the increased rates and make them effective subject to refund during an investigation of their reasonableness. *Second*, the parties may agree to eliminate the utility's right to file unilaterally increased rates under Section 205 of the Act and the Commission's right to impose changes under Section 206,[2] except that the parties may not limit the indefeasible right of the Commission to impose rates where necessary to protect the public interest. *Third*, the parties may agree to eliminate the utility's right to make immediately effective rate changes under Section 205 of the Act, but leave unchanged the Commission's power under Section 206 to replace not only rates that are contrary to the public interest but also rates that are unjust, unreasonable, or unduly discriminatory.

The court, while giving proper deference to the Commission's ruling, undertook its own examination of the APS-PTUA contract to determine which of the three types of rate change provisions it contained. The court reviewed Section 3, Subsection 6 of the agreement, which provides:

> The rates hereinabove set out in this Section 3 . . . are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and

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[2] This restriction is known as the *Mobile-Sierra* doctrine, which arises from the decisions in United Gas Pipe Line Co. *v.* Mobile Gas Service Corp., 350 U.S. 332 (1956), and FPC *v.* Sierra Pacific Power Co., 350 U.S. 348 (1956).

> until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party.

The court noted, as did the Commission, that the contract draws a clear distinction between "the initial one (1) year," during which the initial rates "are to remain in effect," and subsequent years during which those rates remain in effect "unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally" to seek such changes as it may desire. The court concluded that the contract only permitted changes that are necessary in the public interest during the first year, but that the parties intended a less restrictive standard, *i.e.*, changes that are just and reasonable, in the years thereafter. The court rejected PTUA's claim that the Commission should have considered extrinsic evidence in construing the contract, and that the court's earlier decision in *Papago I* had restricted rate changes under the contract to those that meet the stringent public interest standard of Section 206, rather than the just and reasonable standard.

Next, the court examined PTUA's allegations that the Commission had erred in holding that the existing rates were unjust and unreasonable because they would allow APS to earn only a .522 percent rate of return. PTUA challenged the finding on procedural grounds because it was based upon data contained in a compliance filing made by APS after the Commission's initial rate determination. The court noted that PTUA did not challenge the accuracy of the data, the principles applied, or the accuracy of the computations. The court also observed that PTUA could have challenged any ir-

accuracies in APS' compliance filing when it was made, but chose not to do so. The court noted that even on appeal PTUA did not claim that the pre-existing rates were just and reasonable. In view of these facts, the court found that the Commission had not erred in finding the pre-existing rates unjust and unreasonable.

Finally, the court analyzed PTUA's allegations that the Commission had no power to make the just and reasonable rates effective on August 1, 1978, the date of its prior rate determination, because of the rule against retroactive ratemaking. The court examined the Commission's reasoning that the effect of this action was to place the parties in the same position they would have been in if the Commission had correctly interpreted the PTUA contract in the first place. The court noted that the Commission had not made explicit findings of the unlawfulness of the pre-existing rate in its prior order, but that it had done so on January 25, 1982, in its order on remand from *Papago I*.

In 1978, the Commission had made findings that 9.41 percent return overall was a just and reasonable rate. In so doing, the Commission left undisturbed the administrative law judge's finding that a 4.35 percent return was unjust and unreasonable. The Commission found that the existing rates of customers deemed to be under Section 206 at that time were unjust and unreasonable, although it did not include PTUA within this group because it mistakenly believed PTUA's contract to be governed by Section 205. In its order on remand in 1982, after concluding that PTUA's contract provided for a change in rates on a showing that the existing rates were unjust and unreasonable under Section 206, the Commission determined that APS was earning only a .552 percent return from PTUA, and that this was unjustly low.

In reviewing the Commission's determination, the court of appeals noted that there was sufficient evidence in the record to conclude that the existing rates were unjust and unreasonable, and stated that there was ample evidence to conclude that the Commission would have treated PTUA similarly to the other Section 206 customers, similarly affected by the prior order, if it had known that PTUA was properly included in that group. The court also held that the 1800 percent differential between the .552 percent return and the 9.41 percent return was so great that .552 percent could not be within the zone of reasonableness. Thus, after carefully examining the Commission's order and PTUA's challenge to it, the court concluded that the Commission had not abused its discretion on the record before it and denied PTUA's petition.

SUMMARY OF ARGUMENT

In this case the court of appeals approved the judgment of the Commission as to the applicable standard of proof required to approve a rate change under Section 206 of the Federal Power Act. Two other courts of appeals have affirmed the judgment of the Commission in similar cases, *Public Service Co. of New Mexico* v. *FERC*, 628 F.2d 1267 (10th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671 (5th Cir.), *reh. denied*, 590 F.2d 333 (1979). Thus, there is no conflict among the circuits requiring this Court's attention. In addition, the court below applied the same standard in a companion case decided the same day, *Kansas Cities* v. *FERC*, 723 F.2d 82 (D.C. Cir. 1983).

On the merits, the standard applied by the Commission is the correct one. It is derived from the underlying statute, is fully in accord with settled legal principles, and does not conflict with the decisions of this Court or other

courts of appeals. Contrary to PTUA's suggestion, the issue presented below is unlikely to have much impact since the relatively few contracts similar to the one at issue here are unlikely to be renewed once they expire. The vast majority of wholesale contracts subject to the Commission's authority permit rate changes under Section 205 of the Federal Power Act. A writ of certiorari should be granted only for cases of "peculiar gravity and general importance," *American Construction Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372 (1893), which this case is not and thus does not warrant further review.

ARGUMENT

1. There Is No Conflict Among The Circuits

In addition to the court below, two other circuits have addressed the issue presented here and each has reached the same conclusion. In *Public Service Co. of New Mexico* v. *FERC*, *supra*, the Tenth Circuit held that contract language stating that "[t]his contract . . . shall at all times be subject to such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body" did not create a fixed rate contract, and that the just and reasonable standard of Section 206 should apply. Similarly, in *Louisiana Power & Light Co.* v. *FERC*, *supra*, the Fifth Circuit affirmed the Commission's holding that contract language "subject to amendment or alteration . . . in accordance with a[n] . . . order of any governmental authority" permitted rate changes under the just and reasonable standard of Section 206 of the Act. The contractual language presently before the Court is in substance virtually identical to the language in these two cases: "The rates hereinabove set out . . . are to remain in effect . . . unless and until changed by the

Federal Power Commission or other lawful regulatory authority." Accordingly, there is no conflict among the circuits requiring resolution by this Court.

II. The Opinion Below Does Not Conflict With Supreme Court Precedent

The decisions of the court of appeals and of the Commission comport with the decisions of this Court. The decisions do not, in any manner, conflict with this Court's established precedents. In reviewing the case below, the court of appeals properly exercised its judicial duties in reviewing the decision of the administrative agency pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b)

A. The court of appeals applied the correct scope of review and accorded appropriate deference to the judgment of the administrative agency

In reviewing the decision of the Commission on the standard of proof which APS must meet to secure a change in the rates for service rendered to PTUA, the court of appeals accorded correct deference to the decision of the administrative agency which must construe, practically on a daily basis, the meaning of contracts for the sale of electric energy. Specifically, the court of appeals accorded the Commission

> appropriate deference, though not of course conclusive validity, to the judgment of the expert agency that deals with such contracts regularly.

App. p. 30, 723 F.2d at 953 (citation omitted).

The foregoing is the correct standard of review where technical contracts are involved. In particular, with regard to issues of contractual interpretation pertaining to the application of the *Mobile-Sierra* doctrine, it is proper

to defer to the Commission's expertise if its decision is "amply supported both factually and legally." *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958), *reh. denied*, 358 U.S. 942 (1959). *See also Gulf States Utilities Co.* v. *FPC*, 518 F.2d 450, 457 (D.C. Cir. 1975). Contemporaneous with the decision below, the District of Columbia Circuit applied that same standard of review in *Kansas Cities* v. *FERC*, *supra*.

The appellate decision also reveals that the court of appeals undertook a detailed analysis of the contractual provisions and conducted a thorough review of the principles of the *Mobile-Sierra* doctrine as they pertain to the contract in dispute. The court's decision is correct as a matter of contract law, as well as to scope of review, and does not require the attention of this Court.

B. The decisions below have not deviated from this Court's precedents in *Mobile* and *Sierra*

The Federal Power Act contains two provisions governing rate changes by electric utilities subject to its jurisdiction. Section 205 provides for rate changes initiated unilaterally by the utility. The Commission may suspend the proposed rates for up to five months pending an investigation of their reasonableness. At the end of the suspension period the new rates take effect subject to refund and the ultimate determination of their justness and reasonableness. In contrast, Section 206 of the Act contemplates rate changes initiated by the Commission itself (although usually at the request of one of the contracting parties, as permitted by the contract in this case). Under Section 206, the Commission may investigate a utility's existing rates and if it finds them to be unjust and unreasonable, replace them with just and reasonable rates.

This Court ruled in *FPC* v. *Sierra Pacific Power Co.*, *supra*, that a utility may bargain away its right unilaterally to file revised rates under Section 205 of the Act, although the duty of the Commission under Section 206 to replace rates that are contrary to the public interest is indefeasible. A similar rule applies to gas contracts. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*.[3] There is nothing inconsistent with the *Mobile-Sierra* doctrine and the contract in this case whereby the parties have agreed to eliminate the utility's right to file new rates under Section 205, but have left unaffected the Commission's power to replace unjust and unreasonable rates under Section 206 upon request of one of the parties. Under this procedure, the new rates take effect only after a Commission determination of their lawfulness. Unlike the contract involved in the *Sierra* case, the contract between APS and PTUA specifically provides for rate changes initiated by either party after the first year.

APS' contract with PTUA distinguishes between "the initial one (1) year" during which the rates set forth in other provisions of the contract are to remain in effect, and the subsequent years during which those rates were to remain in effect until changed by the Federal Power Commission or other lawful regulatory authority. The contract expressly provides that either party is free to seek such changes. The Commission concluded from this language that the parties had agreed to permit such changes after the first year of the term of the agreement should the existing rates become unjust and unreasonable. The court of appeals correctly recognized that imposition of the strict "public interest" standard re-

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[3] This case interpreted Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d, provisions that parallel Sections 205 and 206 of the Federal Power Act.

quired under *Sierra* type contracts would effectively preclude any change in the contract rate, thereby nullifying that portion of the contract.

Inasmuch as the *Mobile-Sierra* doctrine pertains to fixed rate contracts, the court of appeals cannot be said to have deviated from the precedents of this Court in affirming the Commission's determination that the just and reasonable standard should be applied to a contract with a rate change provision.

C. The decision below properly affirmed the Commission's correction of its previous error

Several of PTUA's other contentions can be disposed of quickly. First, this case does not involve issues of retroactive ratemaking. The Commission erred in its interpretation of the PTUA-APS contract and was corrected by the court of appeals in *Papago I*. On remand, while the record remained open, the Commission placed the parties in the same position they would have been in if the error had not been made. The Commission did not indulge in retroactive ratemaking, it simply corrected an error it had made. As this Court stated in *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223, 230 (1965), *reh. denied*, 382 U.S. 1001 (1966), "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." Furthermore, "[t]o deny the Commission authority to correct its errors on remand is effectively to negate judicial review of the Commission's substantive determinations." *Houston Lighting & Power Co.* v. *United States*, 606 F.2d 1131, 1143 (5th Cir. 1979), *cert. denied*, 440 U.S. 1073 (1980). *See also Tennessee Valley Gas Municipal Association* v. *FPC*, 470 F.2d 446, 453 (D.C. Cir. 1972).

The cases cited by PTUA for the proposition that the order below violates the filed rate doctrine are not on point. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), involved a state court suit seeking damages for breach of contract. It was an action clearly outside of the record in any rate case. *Southern Union Gas Co.* v. *FERC*, 725 F.2d 99 (10th Cir. 1984), involved an explicit attempt by the Commission to make an exception to the filed rate doctrine for what it considered to be egregious conduct. The instant case involves a rate proceeding for which the record was not closed at the time the Commission corrected its error, unlike *Southern Union*. There was neither any egregious conduct nor any attempt by the Commission to make an exception to the filed rate doctrine. *Southern Union* is simply inapposite.

Finally, the court of appeals did not err in affirming the Commission's finding that the existing rates were unjust and unreasonable, and in finding that such a holding would have been made in 1978, as in fact it was with respect to the Company's other Section 206 customers, if the Commission had known that PTUA was a Section 206 customer. The court of appeals considered this Court's holding in *Sierra*, which directed the appellate courts to look to the substance of the requirements of Section 206 rather than to its rigid formalities, and held that the substance of a finding of unjustness and unreasonableness was adequately made in 1978 in the Commission's order establishing just and reasonable rates. In view of the Commission's explicit finding at that time with respect to other customers whose contracts with APS had been determined to fall within the category of Section 206, there was ample evidence to support its decision to make PTUA's new rates effective August 1, 1978.

CONCLUSION

The court of appeals applied the correct standard of review, did not substitute its judgment for that of the agency, assured itself that there was substantial evidence to support the Commission's findings, and closely examined the Commission's reasoning. Nothing more was required. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 10, 1984

APPENDIX

APPENDIX

The full text of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), follows:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the

modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certifications as provided in sections 346 and 347 of Title 28.

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REPLY OF PAPAGO TRIBAL UTILITY AUTHORITY TO OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1652

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY OF PAPAGO TRIBAL UTILITY AUTHORITY TO OPPOSITION TO PETITION FOR CERTIORARI

Our opponents admit that the first issue in this case is whether ". . . the Court of Appeals [correctly] approved the judgment of the Commission as to the applicable standard of proof required to approve a rate change under Section 206 of the Federal Power Act." (Arizona Public Service Co. Br., p. 8). Both the Commission and the Court below base their decision on an interpretation of the agency's statutory powers under Section 206, which rests on the theory that it may act either to protect the public interest or to protect the private interest of the regulated utility when a rate is below the "just and reasonable rate" level specified in Section 206(a), 16

U.S.C. § 824e. Our opponents concede, as they must, that petitioner has a Section 206 contract which, as held by the Court of Appeals, *Papago Tribal Utility Authority* v. *FERC*, 610 F.2d 914, (D.C. Cir. 1979) ("Papago I"), cannot be changed by a company rate filing but can only be changed by order of the Commission. This hard fact exposes the fallacy of the efforts by the Commission and Arizona Public Service Company (APS) to obscure the true issue, which is one of statutory interpretation, by pretending that the issue is only one of the interpretation of the terms of our particular contract. No language in our contract specifies the standards the Commission is to use to make a rate change in the contract rate. Therefore, the statutory standard which governs the Comission's Section 206 powers to override private contracts must govern, and it is the interpretation of that standard which is at issue in this case where the Court below has made a ruling squarely in conflict with this Court's prior holdings.

1. Neither the Commission nor APS denies the truth of PTUA's claim (Pet. pp. 13-14) that this fundamental question of statutory interpretation is one of great importance to the administration of the Power Act. In this connection, PTUA invites the Court's attention to the fact that neither the Commission nor APS denies that the Court below and the Commission have made the new change in law retroactively effective to all existing Section 206 contracts. APS simply makes the self-serving, but wholly unsupported, statement that there are relatively few contracts similar to the one at issue here, and that the vast majority of wholesale contracts permit Section 205 rate changes. The Commission simply states, again without any support, that the question of whether the Court below erred in making the change of law retroactively effective does not present an issue of gener-

al importance (presumably because APS has made the self-serving statement that there are very few such contracts). Thus, PTUA's claims as to the importance of this case stand unrebutted by any fact.

2. The Commission contends (Br., pp. 6-7) that PTUA's contention that the "public interest" standard governs all contracts made when both the Commission and all Courts believed that that was the sole standard governing the Commission's powers to change contract rates under Section 206 is "erroneous." But, the Commission neither rebuts the many cases cited by PTUA nor explains why its reasoning is wrong. APS does not even attempt to rebut PTUA's claim that the Court below committed an egregious error in making its change of law retroactively effective. Thus, this is an appropriate case for summary reversal on the basis of this single error, even if the Commission were right (and we have shown they are wrong) that the issue is not one of general importance.

3. The basic position of the Commission and APS is that Section 206(a) grants the Commission the power to override contracts when such action is necessary to protect the public interest or when such action is necessary to protect the private interest of the regulated utility in receiving no less than a just and reasonable rate of return. Thus, the validity of the interpretation of the statute here at issue made by both the Commission and the Court below rests on a radical dichotomy between the "public interest" and "just and reasonable" standards. This Court flatly rejected precisely this theory, advanced by the Commission in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 352 (1956).

In *Sierra*, the Commission held that the contract was a Section 205 going rate contract. 350 U.S. at 352. *Sierra* claimed that its contract rate would be reviewed, if at all,

only under Section 206. The Commission in its rate order held that even if *Sierra* was correct, the contract rate must be increased because it was unjust and unreasonable. 350 U.S. at 354. It found the contract rate was unjust and unreasonable because it would produce a return lower than the return the Commission had there found to be just and reasonable. *Id.* This interpretation of the terms "unjust" and "unreasonable" (which is the same one used by the Commission and the Court below here) was rejected by this Court in *Sierra*. This Court stated at 355:

> When § 206(a) is read in the light of this purpose (i.e., the scheme of regulation is to protect the public interest), it is clear that a contract may not be said to be either "unjust" or "unreasonable" merely because it is unprofitable to the public utility.

4. The Commission (pp. 5-7) and APS (pp. 12-13) argue that the *Mobile-Sierra* doctrine permits the parties to enter a contract whereby they ". . . have agreed to eliminate the utility's right to file new rates under Section 205, *but have left unaffected the Commission's power to replace unjust and unreasonable rates under Section 206 upon request of one of the parties.*" (Emphasis added; APS Br., p. 12). The short answer to this claim is that if the Commission lacks such power because just and reasonable rates under Section 206 are coextensive with rates contrary to the public interest under that section, the fact that a contract does not deprive the Commission of a power it does not have is irrelevant. Thus, the so-called "contract" argument is seen to be dependent upon the assumption that the Commission and APS are correct in their basic interpretation of the scope of the Commission's statutory powers under Section 206(a), which is, as they admit by their silence, a certworthy issue.

5. The Commission contends that the filed rate doctrine only prohibits a utility from collecting unfiled rates (Br. p. 7), and that here APS' rates were filed and in effect from August 1, 1978 forward. The Commission again misstates the law. In *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), this Court held that the filed rate doctrine "forbids a regulated entity from charging rates for its services other than those *properly* filed with the appropriate federal regulation authority." 453 U.S. at 577 (emphasis added). In this case, the Court in *Papago I*, cited *supra* at 928, held that the instant rate had not been properly filed. This rendered that rate filing void. As this Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956), when, as here, a utility lacks the contractual power to make unilateral rate filings, such a filing is "a nullity insofar as it purport[s] to change the rate set by its contract . . . and that the contract rate remained the only rate."

6. The Commission (Br., p. 8) misstates the facts in stating that *Papago I* ". . . did nothing more than *remand* the case to the Commission. . . . ." For, that Court *reversed* the case as to PTUA and Electrical District No. 1, and remanded it for further proceedings. (*Id.* at 930). We have shown (Pet. pp. 10-11) that the August 1, 1978 Order did not meet the test of Section 206, and the express findings required by Section 206 were not made until January 25, 1982. Therefore, there was no legally filed rate before that date, and the Order on Remand violates the filed rate doctrine. A new rate may not be implemented until the proper Section 206 findings have been made. *Sierra*, *supra*, 350 U.S. at 353. Contrary to the tacit assumption made by the Commission and APS, *Sierra* holds only that a *new hearing* may be unnecessary; it does not hold that even if proper evidence is already of record, the rate fixed by the Commission after a judicial reversal may be made *retroactively effective*.

7. The Commission (Br., p. 18) and APS (Br., p. 14) flatly misstate the true facts in stating ". . . the Commission in its 1978 Order in effect found the existing rates unjust and unreasonable, thus meeting the 'substantial purpose' of the Section 206(a) requirement" (Br., p. 18). APS makes the exact same misstatement in claiming an equivalence between the ". . . Commission's explicit finding at that time [in 1978] with respect to other customers whose contracts with APS had been determined to fall within the category of Section 206 . . ." and the PTUA contract (Br., p. 14). These misstatements are of crucial importance, because they are the nub of our opponent's arguments that there was ample evidence in the Commission's 1978 decision to support its finding made 42 months later that PTUA's existing contract rates were unjust and unreasonable within the purview of Section 206(a). The true facts are that the Commission expressly held in its Order on Remand of January 25, 1982 that Section 206 requires the utility's pre-existing rates to be found unjust and unreasonable, and that such findings had to be made with respect to PTUA and Electrical District No. 1. (Appendix, p. 10). But, the Commission's August 1, 1978 Order Affirming Initial Decision (R. 177),[1] did nothing more than affirm its Administrative Law Judge's Initial Decision on Application for Rate Increase of December 19, 1977 (R. 132). In his decision, the Law Judge found that it was unnecessary to make any findings concerning the lawfulness of the existing rate, and he found only that the new rate filed by APS under Section 205 was just and reasonable. Thus, he held:

> In the context of this proceeding, *a finding that a new rate to the Districts is just and reasonable would mean that the existing rate is unjust and unreasonable*. And the "adversely-affect-the-public-interest"

[1] References to the Certified Record in D.C. Circuit Nos. 82-1338 and 1339 shall hereafter be designated (R.____).

> criterion for increasing an existing contractual rate, set forth in *Sierra Pacific*, is not applicable. (Emphasis added, footnote omitted).

APS argues (p. 13), citing *United Gas Improvement Co.* v. *Callery Properties*, 358 U.S. 103 (1958), that on remand the Commission properly related the effective date of the rate prescribed in the Order on Remand back to the date of its rate order in the same docket, August 1, 1978. Thus, it denies that there was retroactive ratemaking. This argument suffers from several flaws. First, this entire argument is a post hoc appellate rationalization which has no foundation in the Order on Remand. Second, *Callery* involved a remand of a rate fixing order, while this case involves a reversal of an agency order denying a motion to reject. Thus, after this Court's decision in *Papago I*, there was no longer any rate proceeding with respect to PTUA to which the Commission could relate back the rates prescribed in the Order on Remand.

8. The Commission (Br. p. 8) and APS (Br. p. 14) attempt to distinguish *Southern Union Gas Co.* v. *FERC*, 725 F.2d 99 (10th Cir. 1984), which PTUA showed was in conflict with the decision below (Pet. p. 15), on the spurious ground that there, unlike here, there was no filed rate. The short answer to this claim is that we have already shown (p. 5), *supra*, the APS filed rate was a nullity and thus the two cases are identical in this respect. APS also attempts to distinguish *Southern Union* on the equally false ground that the instant case involves a rate proceeding for which the record was not closed when the Commission corrected its error, whereas the record was closed in *Southern Union*. (Br. p. 14). But, the record underlying the Commission's August 1, 1978 Order in this docket was closed long before the Court issued its Order in *Papago I* on January 11, 1980. APS' claim (*Id.*) that

Southern Union involved an attempt by the Commission to make an exception to the filed rate doctrine for "egregious conduct," which element is lacking here, hurts rather than helps its cause. Certainly, if no such exception can be made to punish a wrongdoer who has deliberately violated the Commission's enabling act, it is improper to make such an exception where no such violations by anyone have been found.

CONCLUSION

For the foregoing reasons and those presented in our petition, it is respectfully submitted that PTUA's petition for certiorari and motion for summary reversal should be granted.

Respectfully submitted,

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May 25, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 1984, 3 printed copies of the foregoing Reply of Papago Tribal Utility Authority to Opposition to Petition for Certiorari were mailed, postage prepaid, to the following:

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